A Guide to the Judicial Management of Bankruptcy Mega-Cases

Second Edition

Laura B. Bartell
Professor of Law
Wayne State University Law School
Detroit, Michigan

Based on the first edition by

S. Elizabeth Gibson
Burton Craige Professor of Law
University of North Carolina at Chapel Hill
School of Law
Chapel Hill, North Carolina

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Introduction

In 1992, the Center published the first edition of this Guide. Its target audience was bankruptcy judges assigned and confronted with a large Chapter 11 case for the first time. The Guide aimed to pool the knowledge of bankruptcy judges and clerks experienced in handling such mega-cases.

In 1992, the United States bankruptcy courts were in the midst of a sharp increase in filings. That calendar year there were 19,436 business Chapter 11 case filings in the United States bankruptcy courts. In 2006, there were only 5,345 business Chapter 11 case filings.[1] Given the dramatic decline in Chapter 11 cases over the past 14 years, why is there a need for a new edition of this Guide?

First, although many of the very large Chapter 11 cases continue to be geographically concentrated in the District of Delaware and the Southern District of New York, many such cases are being filed in other districts across the country. In 1999, 84% of the 319 Chapter 11 cases with assets exceeding $100 million were filed in either the District of Delaware or the Southern District of New York, with at least one such case being filed in just 14 other districts. In 2006, although 73% of the 424 Chapter 11 cases with assets exceeding $100 million were filed in the District of Delaware and the Southern District of New York, at least one such case was filed in 29 other districts. Between 1999 and 2006, up to 45 districts received at least one such case in any given year. Thus, bankruptcy judges outside the District of Delaware and the Southern District of New York are more likely now than in 1992 to see a very large Chapter 11 case, but probably do not have extensive experience with such cases, and therefore have more need for a resource to help them.[2]

Second, technological advances have made many of the administrative procedures suggested in the first edition of the Guide obsolete. The Case Management/Electronic Case Filing system is eliminating the mounds of paper that required filing, indexing, service on other parties, and storage. Almost all parties in interest now have email and Internet access, so communications have become instantaneous and inexpensive. Almost all bankruptcy courts have websites. Long distance participation in conferences and even court hearings is no longer a rarity. The Guide had to reflect these changes.

Third, in 2005, Congress enacted the most sweeping changes to the Bankruptcy Code since the Code was adopted in 1978. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("the 2005 Amendments") made many substantive changes to the Code that not only dramatically changed consumer bankruptcy, but

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1. "Business filings" are defined as cases involving predominantly business debts rather than consumer debts. The statistics in this paragraph are from the Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts*, at Table F-2 (1992 & 2006).

2. These statistics were provided by the Bankruptcy Judges Division of the Administrative Office of the U.S. Courts.

also affected the landscape for the mega-case. Revisions to the Guide were necessary to highlight these changes.

In 2003, the Judicial Conference of the United States Committee on the Administration of the Bankruptcy System, with the assistance of the Federal Judicial Center, held a conference on large Chapter 11 cases attended by invited judges, attorneys, and academics. The purpose of the conference was to look at the factors that bear on selection of a venue for filing a mega-case and to examine the procedures courts have adopted for handling such cases inasmuch as they bear on venue selection. Those attending the conference agreed that, among other reasons, large Chapter 11 cases are filed in those districts in which the bankruptcy judges are perceived to be experts at handling these cases and handle them in a timely and predictable way.

Expertise is acquired both by experience and by study. The participants at the 2003 conference recommended that the Guide be updated and made available online. The topics covered in this Guide are those identified by judges who have confronted them in many mega-cases, and for each topic the Guide provides model orders, rules, or suggested approaches that may be helpful for the newcomer.

Not surprisingly, this Guide does not have all the answers. Other publications may also provide useful suggestions (*see, e.g.*, Conference on Large Chapter 11 Cases (Federal Judicial Center 2004), E. Warren, Business Bankruptcy (Federal Judicial Center 1993, under revision); Case Management Manual for United States Bankruptcy Judges (Federal Judicial Center and Administrative Office of the U.S. Courts 1995); Manual for Complex Litigation, Fourth (Federal Judicial Center 2004); and S. Elizabeth Gibson, Judicial Management of Mass Tort Bankruptcy Cases (Federal Judicial Center 2005)). Nor is this Guide relevant only to a mega-case; although this Guide's focus is the large Chapter 11 case, some of the discussion is also applicable to smaller and other types of cases. The Guide is intended to provide only a starting point for the consideration and creativity of each individual judge. Each case presents its own unique challenges to the presiding judge, and standard procedures cannot be followed in every situation. But the Guide is intended to be a resource for judges (and practitioners) confronting a mega-case perhaps for the first time. It describes the general timeline of a case, the issues that are likely to arise, and how others have approached those issues. Users of this Guide may themselves become contributors to the next edition, as they increase their expertise and gain experience in handling the large Chapter 11 case.

The exhibits referenced in this Guide are available on the Federal Judicial Center Internet and intranet sites in both PDF and Word format.

A couple of stylistic notes:

- this Guide uses the term "debtor" to include not only the "person or municipality concerning which a case under [title 11] has been commenced," 11 U.S.C. § 101(13), but also a Chapter 11 debtor acting as debtor in possession

pursuant to 11 U.S.C. § 1101(1) and exercising the rights of a trustee in bankruptcy under 11 U.S.C. § 1107(a); and

- whenever this Guide uses the term "U.S. trustee" it also intends to refer to a bankruptcy administrator in the judicial districts of North Carolina and Alabama.

I. The Case Begins

Identifying the Mega-Case

Although many of the procedures described in this Guide are case-management tools that may be applied to any Chapter 11 case, they are particularly useful when the case is a mega-case. The Administrative Office's working definition of a mega-case is "an extremely large case with: (1) at least 1,000 creditors; (2) $100 million or more in assets; (3) a great amount of court activity as evidenced by a large number of docket entries; (4) a large number of attorneys who have made an appearance of record; and (5) regional and/or national media attention" (Guide to Judiciary Policies and Procedures, section 19.01). In addition, some courts have adopted definitions of mega-cases in their local rules setting forth procedures for identifying and managing complex or large Chapter 11 cases.

Under some of these local rules, any party in interest may seek to designate a case as one to which these special procedures should apply by filing a motion. The factors to be considered by the bankruptcy judge in determining whether to label the case as complex or large generally include:

- the large number of parties in interest;
- the size of the case in terms of assets and liabilities (some courts use a threshold figure of total debt of $5 million or more than $2 million in unsecured nonpriority debt; others have much higher thresholds);
- whether claims against the debtor or equity interests in the debtor, or both, are publicly traded;
- the need for "first day" emergency hearings; and
- the need for simplified notice and hearing procedures.

After reviewing the motion, the bankruptcy judge may agree that the case qualifies for the special procedures or may deny mega-case treatment. A sample motion for complex Chapter 11 case treatment and a sample order granting such treatment are included as Exhibits I-1A and I-1B.

Before the Filing

Both the court and counsel need to begin to plan for the management of the large Chapter 11 case before the case is even filed. Counsel should be encouraged to meet or otherwise communicate with the U.S. trustee and the clerk of the bankruptcy court in the district in which a filing is contemplated to alert them to the imminent filing of a mega-case.

Having been alerted to the proposed filing, the clerk can take steps to prepare for the increased demands on the clerk's office, some of which can be implemented even

before the case is filed and the identity of the debtor becomes known. For example, if existing personnel are inadequate to meet the anticipated needs of the case, the clerk can discuss with counsel for the debtor and others ways of obtaining additional assistance (at the expense of the estate), such as hiring notice-processing professionals and copy services, establishing a webpage for public information, or undertaking other special tasks. The clerk's office may make plans to amend its automated telephone message to direct callers with inquiries about the new case to debtor's counsel, a public relations firm (if one has been retained), or a website. The clerk might ask the approximate time the case filing is likely to occur so that the clerk's office can be prepared to make an immediate assignment of the case to a judge, if quick action is necessary. The clerk will also want to know if multiple cases will be filed, and whether a joint administration will be requested. If there are going to be requests for first day orders, the clerk can advise counsel on the appropriate procedure to be followed so that the judge and the judge's law clerk(s) can deal with them expeditiously. The clerk should ensure that the debtor's attorneys and their staffs have been trained in the Case Management/Electronic Case Filing (CM/ECF) system. The clerk might also ask if counsel has communicated with the office of the U.S. trustee.

The U.S. trustee also may wish to know if any first day orders will be requested, and the substance of any such proposed order, so that the U.S. trustee can be prepared to participate meaningfully and provide consent to noncontroversial motions (e.g., extensions of time to file schedules, wage and benefit payments up to statutory limitations, and professional employment issues). Some U.S. trustee offices may have established guidelines for what they will approve and what they will oppose. In some districts, the U.S. trustee may also request information about the debtor, its debt and equity structure, and types of creditors (including any involvement by federal entities, such as the Internal Revenue Service or the Pension Benefit Guaranty Corporation)—this information is necessary to enable the U.S. trustee to form an appropriate committee or committees as soon as possible after the case is filed. In particular, the U.S. trustee may seek to obtain accurate contact information for the persons representing the debtor's principal creditors who would be making decisions with respect to participation in the case. Sometimes the debtor has worked extensively with an informal committee prior to the filing; information about this relationship might be important to the U.S. trustee. Advance notice of the case filing also will assist the U.S. trustee in scheduling, which will allow the clerk's office to allocate personnel appropriately to serve the needs of existing cases while handling the demands of the mega-case in the most efficient and timely way possible.

Filing the Petition

A bankruptcy judge should not accept a petition for filing or act on any matter in connection with a case prior to its filing. If court assistance is needed in connection

with the filing of a mega-case, the lawyers should be directed to communicate with the clerk's office to obtain such assistance. After consulting with the bankruptcy clerk, counsel for a debtor that is a public company should consider filing the petition through the CM/ECF system during the night or on a weekend in order to avoid disrupting the financial markets. Bankruptcy Rule 5001(a) states that the "courts shall be deemed always open for the purpose of filing any pleading or other proper paper," even if the clerk's office is not physically open. In other cases, counsel might file the case shortly before a Friday payday and request expedited treatment of a motion to pay employees from postpetition financing or use of cash collateral.

Case Assignment

Districts that have more than one judge use various methods of assigning cases, although most methods share the feature of being random. The CM/ECF system contains an automated judicial assignment feature, but not all districts employ it. Whatever system is used, the selection of the assigned judge should not be subject to manipulation by the debtor's counsel, the clerk's office, or anyone else in order to choose (or to avoid) a particular judge. After the case is assigned, any necessary or appropriate recusals can be made.

If a mega-case consists of several related case filings, as it often does, courts may choose different approaches. In some districts, each of the affiliated cases is randomly assigned like any other bankruptcy case. Then, once the cases have been filed, counsel may seek a joint administration by filing a motion to that effect under Bankruptcy Rule 1015(b) with the presiding judge (generally the judge assigned the first of the affiliated cases filed). If the motion for joint administration is granted, the affiliated cases are transferred to the presiding judge. An alternative approach is for all the affiliated cases to be assigned to a single randomly selected judge if a motion for a joint administration is being made. Then if the motion is granted, the affiliated cases need not be reassigned. A local rule on joint administration of cases is included as Exhibit I-2.

Venue

Even if the mega-case has been filed in a district in which venue is proper under 28 U.S.C. § 1408, the district may not be the most appropriate forum for the case. The liberality of the bankruptcy case venue provisions—which allow a filing in the jurisdiction in which the debtor is incorporated or in which a case is pending concerning an affiliate of the debtor, as well as the location of the debtor's principal place of business or principal assets in the United States—have been controversial, particularly in large cases in which there are significant numbers of parties who may be located hundreds of miles away from the court where the filing is made. These provisions cover filings by companies that are incorporated in one jurisdiction, but whose

headquarters, operations, employees, and creditors are located in other parts of the country. The change of venue provisions in 28 U.S.C. § 1412 allow the court to transfer a case or proceeding under title 11 to another district "in the interest of justice or for the convenience of the parties." Federal Rule of Bankruptcy Procedure 1014 currently provides that venue can be transferred on motion of a party in interest. Case law in some jurisdictions has interpreted this rule to limit judicial action absent such a motion. Other jurisdictions have upheld sua sponte transfer, either relying on section 105 of the Bankruptcy Code or the interaction of various statutory provisions. Proposed revisions to Bankruptcy Rule 1014 state explicitly that the court can order the change of case venue sua sponte. In addition, the Bankruptcy Committee and the Judicial Conference have approved a recommendation to amend 28 U.S.C. § 1412 to explicitly authorize a bankruptcy judge to consider venue sua sponte. The Judicial Conference will forward the recommendation to Congress at an appropriate time.

If the court decides to retain a case in which venue causes substantial hardship to distant parties, it can help ameliorate the impact of the chosen venue by improving access to information about the case through websites, allowing out-of-town counsel to appear *pro hac vice* without the necessity of hiring local counsel, allowing appearances by telephone and teleconferencing in appropriate situations, and requiring counsel to prepare periodic status reports.

A frequent complaint about distant venues has been that adversary proceedings to recover preferences and fraudulent conveyances have been commenced in venues inconvenient for the defendants, allegedly coercing settlement by increasing the costs of defense. The 2005 amendments to 28 U.S.C. § 1409(b) limit the venue in which the debtor in possession or trustee can commence a proceeding to recover preferences, fraudulent transfers, and other claims. Venue of a proceeding to recover a money judgment of or property worth less than $1,000 is proper only in the district court for the district in which the defendant resides. If the proceeding is to recover less than $10,000 from a noninsider, venue is also limited to the district court in which the defendant resides.

First Day Motions

As soon as a mega-case is filed, the debtor will typically ask the bankruptcy judge to rule on various motions affecting the debtor's ability to administer the bankruptcy estate and continue to operate its business. Often called first day motions, these motions may or may not be made on the first day of a bankruptcy case, but are usually the first motions to be presented to the court for resolution. Motions that are frequently made at an early stage in the case relate to both administrative matters and substantive issues. Administrative matters may include the following:

- motion for a joint administration (discussed in more detail in Part II, *infra*);
- motion to establish noticing procedures;

- motion to authorize retention of a claims and noticing agent;
- motion to extend time to file required schedules and statements of financial affairs;
- motion to authorize maintenance of existing bank accounts and cash-management system; and
- motion to establish regularly scheduled hearing dates.

Other first day motions seek resolution of substantive issues:

- motion to provide or establish procedures for determining adequate assurance to utilities pursuant to section 366 (discussed in more detail in Part II, *infra*);
- motion to retain professionals (discussed in more detail in Part II, *infra*);
- motion to pay prepetition employee wage and benefit claims (discussed in more detail in Part II, *infra*);
- motion to pay critical vendors (discussed in more detail in Part II, *infra*);
- motion to pay prepetition sales, use, payroll, and other taxes that constitute priority claims under section 507;
- motion to honor customer obligations and deposits to the extent provided by section 507; and
- motion for emergency interim use of cash collateral or postpetition financing and scheduling of a final hearing relating thereto (discussed in more detail in Part II, *infra*).

Courts differ on what motions they are willing to consider on the first day and may employ different procedures depending on whether the motion is administrative or substantive in nature. In addition, the Advisory Committee on Bankruptcy Rules has published proposed rule changes that would regulate the use of certain first day motions. These changes could be effective in 2007.

Motions with respect to first day orders should be heard promptly. How promptly they should be heard depends on the circumstances, and debtor's counsel might address that issue with the clerk prior to filing the case. Courts are encouraged to develop routine procedures, including using standard timeframes, for handling first day motions so attorneys can plan accordingly.

First day motions and all related papers should be served on the U.S. trustee, all secured creditors, the 20 largest creditors of the debtor, all taxing authorities, and any other party who would reasonably be expected by the debtor to oppose the motion. Service should be initiated even before a hearing date and time have been established; after the hearing is scheduled, each party served with the motion should be served with a notice of hearing by the most expeditious manner available (electronically, hand delivered, or overnight mail). At the hearing, counsel should be prepared

to present to the court a declaration as to the efforts made to serve all required parties.

Because the bankruptcy judge is asked to rule on first day motions before other parties in interest may have received effective notice, the judge needs to carefully consider not only whether the relief sought is justified and authorized by the Bankruptcy Code, but also whether the relief is sufficiently important to the initial stages of the case that it should be granted before greater notice and opportunity for a hearing are provided to other parties. Even if expedited treatment is necessary, the judge might place time limits on the duration of any order entered, making it an interim order only (subject to later objection and modification at the final hearing); make the order subject to objection by any interested party within a specified period after its entry (perhaps 45 days); or delay its implementation so that notice can first be given to all interested parties. Many courts act only on those motions and applications that are truly essential and delay consideration of other motions for a short period to allow adequate notice and opportunity to be heard. Notice of the entry of any order should be given to all parties on whom service of the first day motions was made as described above.

Courts might consider requiring by local rule, general order, or specific case-management order that all first day motions (1) be designated as such and be accompanied by a separate motion for an expedited hearing, and (2) begin with a brief summary setting forth what relief is requested and explaining the reasons why granting such relief is appropriate.

Although some first day motions seek relief that is clearly authorized by existing law, such as an extension of time to file various schedules or lists of information or a requested waiver of the requirements of Bankruptcy Code § 345(b), in other instances the debtor may seek to engage in conduct not directly authorized under the Bankruptcy Code or Rules in order to avoid disruptions to its business operations. The court should be cautious about ruling on motions of this type on an ex parte or limited-notice basis. Motions that may give rise to such concerns are motions to pay so-called "critical" vendors' prepetition claims to encourage continued shipments of needed goods; cash-management motions (authorizing the continued consolidation of cash management among related companies); motions for approval of the debtor's investment guidelines; motions to permit immediate payment of prepetition wages and benefits out of estate assets; and motions to permit the debtor to maintain its prepetition bank accounts and to continue to use its existing checks and business forms. In ruling on such a motion, the bankruptcy judge needs to consider the interests of all parties in interest; the amount of notice that parties in interest have had and whether it is sufficient to allow them to be heard effectively; whether a creditors' committee has been formed and has obtained counsel; and the position of the U.S. trustee. The court must balance the needs of the court and other parties against the

practical difficulties inevitably encountered in a mega-case, including, among other things, the amount of prefiling preparation time available to the debtor.

The court has several options when such motions are presented. First, the court can limit its emergency ruling to what is absolutely necessary to allow the debtor to operate until adequate notice and opportunity to be heard can be achieved. For example, if the debtor is requesting authority to pay certain prepetition claims and the court finds that it has authority to grant such a request, the court might grant the request only as to those claims that are truly emergency matters, reserving a ruling on the others to a later hearing. Second, the court can authorize emergency relief pending a hearing given after appropriate notice to all interested parties. Third, some courts enter an order that does not become final until a certain number of days (perhaps 30–60) during which all parties have the opportunity to file an objection to the order, in which event a hearing will be held.

Organizational Meeting

Whether or not counsel has met with the clerk's office and the U.S. trustee prior to filing the mega-case, shortly after the filing it would be useful for debtor's counsel to arrange a meeting of representatives of the clerk's office, the U.S. trustee, the official committee of unsecured creditors (if one has been established), major unsecured creditors (if no official committee has yet been designated), major secured creditors, and debtor's counsel to discuss the administration of the case. This meeting will provide an opportunity for the clerk's office to discuss ways in which the debtor could provide outside assistance to the bankruptcy court pursuant to 28 U.S.C. § 156(c), if the subject has not previously been discussed. The parties also can work together to prepare a procedural order (if the court does not have a standing order or procedures for mega-cases, or the parties can supplement or modify the court's standing order or procedures, as appropriate) to deal with such matters as notices, hearings, handling claims, and other special procedures.

Use of Outside Facilities and Services

A bankruptcy court is authorized by 28 U.S.C. § 156(c) to use additional "facilities or services, either on or off the court's premise, which pertain to the provision of notices, dockets, calendars, and other administrative information to parties" in bankruptcy cases "where the costs of such facilities or services are paid for out of the assets of the estate and are not charged to the United States." The Judicial Conference issued guidelines for implementing 28 U.S.C. § 156(c) in March 1989. They are included as Exhibit I-3.

These guidelines describe the type of assistance that may be useful to the court and the procedures required to obtain such assistance. Although many of the observations have been rendered obsolete by the implementation of the CM/ECF system and

the availability of publicly filed documents through the PACER system, certain types of assistance may still be useful in individual cases.

Personnel. Generally, courts have found that keeping mega-cases separate from the regular flow of the clerk's office promotes efficiency. Ideally, one person in the clerk's office should be placed in charge of the case. This person, who may be a regular employee or someone hired by the debtor specially for the case, will become familiar with the case and its history, the lawyers involved, and the current status of the docket and can respond to questions and provide guidance more quickly than someone without that background.

If the clerk's office is not able to provide these additional services, such services may be provided by personnel employed by the estate to assist the clerk's office. Such special employees are selected by the debtor (with the concurrence of the clerk or bankruptcy judge) and work under the supervision of the clerk, ideally in the clerk's office. Although special employees are selected by the debtor, such personnel should not receive directions from or perform special services for the debtor or the U.S. trustee. To avoid any appearance of favoritism, it would be best if former employees of the debtor are not retained to act in this capacity.

Special employees are not paid by the government and do not constitute government employees. The guidelines explicitly provide that special employees should not be administered an oath of office because that may create the erroneous impression that they have a government position. Instead, all such employees should be asked to sign written waivers acknowledging their nongovernmental status, waiving any right to receive compensation from the government, and setting forth their work obligations, including their obligation of confidentiality. (Exhibit I-4 is a sample waiver form for these special employees.) Because they are not governmental employees and are paid by the estate, special employees should not perform services for any other case or for the clerk's office generally.

Filing and Claims Processing. Under 28 U.S.C. § 156(e), the bankruptcy clerk is the official custodian of the records and dockets of the bankruptcy court. Bankruptcy Rules 3002(b) and 5005(a) require that proofs of claim and interest be filed with the clerk's office in the district where the case is pending (unless the bankruptcy judge permits them to be filed directly with the judge). Electronic filing of proofs of claim and interest is increasing, and it may become the norm. Until that time, the court may consider requiring the debtor to rent a special post office box for receipt of proofs of claim or interest and to provide special employees to transport the mail so received to the court. Once the proof of claim or interest has been duly filed, the task of maintaining any physical documents may be delegated to an outside claims agent paid from the estate under 28 U.S.C. § 156(c). (Exhibit I-5 is a sample order appointing an outside claims agent.)

The clerk must institute a system to ensure the integrity and security of the records in the hands of any claims agent before any claims are filed. The clerk also

should establish mechanisms for monitoring the implementation of the agreed safeguards. For example, the guidelines suggest that the outside claims agent be required to provide an acknowledgment when a proof of claim or interest is filed, and that creditors be informed that they should contact the clerk's office if they do not receive such an acknowledgment within a specified time after filing. The clerk can also perform random checks at the claims processing facility, pulling claims and checking to make sure appropriate records are maintained. The clerk should have unfettered access to the database of the claims agent so that the clerk's office can search the claims register at any time.

Bankruptcy Code § 107 specifies that papers filed in a bankruptcy case are public records and requires that they be open to examination at reasonable times without charge unless the bankruptcy court provides otherwise. If the proofs of claim and interest are maintained by an outside claims agent, the clerk must ensure that the requirements of section 107 are fulfilled. Therefore, the filed documents must be available at the third-party location for public examination during normal business hours. Ideally, the claims agent should maintain a website through which interested parties can review filed claims. In addition, the guidelines suggest that the clerk should "attempt to make as much information available as is possible" at the clerk's office.

After a mega-case is concluded, the clerk is responsible for the proper disposition of the papers filed in the case, including those maintained by an outside claims agent. The clerk must give appropriate instructions to the claims agent with respect to final disposition of those documents, either in an initial memorandum or at the conclusion of the case. Most experienced claims agents are familiar with this final disposition process and can provide suggestions.

Noticing. Because a mega-case involves large numbers of parties, the clerk's office will probably not be able to provide notices, except to the extent that the court utilizes e-mail notices in connection with the CM/ECF system or transmits notices by the Bankruptcy Noticing Center (BNC). Bankruptcy Rules 2002(a) and 2002(b) provide that notice be given by "the clerk, or some other person as the court may direct." In a mega-case, when notices outside the CM/ECF and BNC systems are necessary, the court would be well advised to place the burden of providing notices on the debtor or an outside firm hired by the debtor for that purpose. This designation should be made by court order, specifying the exact duties imposed. (Exhibit I-6 is a sample order directing the debtor to give notices.)

The costs to the estate of providing notices is payable as an administrative expense. Therefore, it is in the interest of all parties that the required notices be minimized to the extent practicable and permissible under the Bankruptcy Rules. Certain notices are required to be served upon all parties in interest under the Bankruptcy Rules. However, the court may order that a special service list (sometimes called the "Short List" or the "Special Notice List") be established for a mega-case for all mat-

ters that are not required to be noticed to all creditors and other parties in interest. All creditors and other parties in interest should receive notice of that order.

The Short List should initially include the U.S. trustee, the debtor, the debtor's counsel, the 20 largest unsecured creditors (until appointment of a creditors' committee), any official committees and their counsel, any secured creditors, any indenture trustee, any large equity holders, all taxing authorities, and (if the debtor is a public company) the Securities and Exchange Commission. Any party (or counsel for any party) should be added to or deleted from the Short List upon written request filed and served upon the debtor and the debtor's counsel.

Counsel for debtor should be responsible for maintaining both the Short List and a list of all parties who are entitled to receive service when service is not made pursuant to the Short List, and should be required to furnish it, upon demand, to any party in interest. Current versions of the Short List and full service list should be accessible to the court and interested parties on the case website, if one exists. Otherwise, the debtor should be required to file and serve upon all parties on the applicable list updated versions of the list whenever a party is added or deleted and even in the absence of any change, on a regular periodic basis, perhaps monthly (a shorter period may be appropriate early in the case).

All parties should be encouraged to authorize service by fax or e-mail pursuant to Bankruptcy Rule 9036; such authorization can be included in a party's notice of appearance and request for service. Many courts in connection with mandating filings under the CM/ECF system have included a provision authorizing electronic service whenever service is made pursuant to Bankruptcy Rule 7005.

If the debtor or the debtor's agent is required to provide notices, the clerk should take steps to ensure that this is done properly. The Judicial Conference guidelines provide that the bankruptcy court or clerk should approve the form and content of any notice not provided by the clerk's office and should require for each notice served that a certificate of service be filed, including a copy of the notice and a list of persons served. The local rules often provide the appropriate form of notice that should be used, in which case prior approval is not necessary. Some courts also do not require prior approval of routine notices of hearings required under local rules or under the court's standard operating procedures.

Interested parties in a case who are not on the Short List may review the docket and any electronically filed documents at the clerk's office without charge, or may review the documents electronically through the Public Access to Court Electronic Records (PACER) system at a nominal per-page charge by becoming a registered user. Members of the public may review the docket and documents in the same way. Some courts require the debtor to establish and to maintain a website that may include all, or all significant, pleadings. Professionals are available to create and maintain websites at a reasonable cost. In addition, some courts have a special website for all of the district's mega-cases from which users can link to pages for each case list-

ing case-management orders, the docket, and other information. The media finds this type of website to be particularly useful in cases with significant public interest because members of the media generally do not have PACER accounts.

Additional Equipment and Facilities. A mega-case may impose extraordinary burdens on the physical equipment of the bankruptcy court. As authorized by 28 U.S.C. § 156(c), the court may require that the estate provide or pay for additional equipment needed by the clerk's office to handle the case. For example, the estate may be asked to provide computer hardware or software, filing cabinets, or a special work station in the public area of the clerk's office where the public can access documents filed electronically and can download them for a reasonable fee. The court might also require the estate to install additional telephone lines dedicated exclusively to the mega-case, to set up a special toll-free number, or to create a special website for the case linked to the debtor's website or to that of the bankruptcy court. When a mega-case requires additional work or storage space offsite, the estate may be ordered to pay for the rental of additional facilities.

If the clerk's office purchases any additional equipment or rents facilities under 28 U.S.C. § 156(c), the guidelines of the Judicial Conference state that the clerk should inform the seller or lessor that the estate is responsible for payment, not the bankruptcy court. The guidelines state that any "equipment, furniture, or other facilities leased or purchased at the estate's expense for the court's use in a bankruptcy case is property of the estate and will be returned to the estate after its use by the bankruptcy court."

Procedural Guidelines

Once a case is designated as a "complex" or "large" Chapter 11 case, it may become subject to certain procedures by local rule or standing order of the applicable bankruptcy court. Among the bankruptcy courts that have administrative orders implementing procedures for complex Chapter 11 cases are the District of Maryland, the District of New Jersey, the Central District of California, the Southern District of Indiana, the Eastern District of Michigan, the District of South Carolina, the Northern District of Texas, and the Southern District of Texas. The general order regarding procedures for complex Chapter 11 cases for the bankruptcy court for the Northern District of Texas is attached as Exhibit I-7.

If the local rules or administrative orders do not fully specify the applicable procedures to be followed in a mega-case, after holding an initial status conference, as contemplated by 11 U.S.C. § 105(d), the bankruptcy judge should consider entering a case-management order to establish the procedures that will apply to the case. In any event, because a mega-case will involve large numbers of lawyers, many of whom may be unfamiliar with the procedures and practices of the local bankruptcy court, the judge may want to consider holding an initial hearing or status conference early

in the case to discuss administrative matters and the judge's procedures and expectations. A record of this hearing or conference, or the case-management order that results from it, should be readily available on the case website because many out-of-town attorneys do not get directly involved in the case until later.

Among the topics that can be covered at the status conference and in the case-management order are

- noticing and filing requirements (discussed above);
- procedures for scheduling and hearing motions and related adversary proceedings;
- rules governing local counsel and *pro hac vice* admission;
- the setting of appropriate deadlines, including, for example, deadlines for assuming or rejecting executory contracts, filing the disclosure statement and plan, and soliciting acceptances of the plan;
- methods of appearing at hearings and presenting evidence (including telephone appearances and videoconferencing);
- contacts with the court; and
- which electronic devices (e.g., cell phones, laptops, personal digital assistants) may or may not come into the courtroom.

Examples of case-management and administrative procedures that might be incorporated into an order in a specific case are attached as Exhibit I-8. Examples of an initial order with respect to administrative matters in jurisdictions without a standing general order specifying those procedures are attached as Exhibit I-9.

As the case progresses, the judge may find it necessary to hold additional conferences and supplement or amend the case-management order to further the expeditious and economical resolution of the case.

Scheduling and Hearing Motions. The mega-case tends to produce a large number of motions. If such motions are scheduled through the normal court procedures, the burden on the court and the clerk's office could become severe. Therefore, many courts find it useful to set aside certain days each week or each month exclusively for hearings in the mega-case (called omnibus hearing dates). Because the lawyers know in advance when such hearing days are available, they can schedule motions themselves in accordance with the procedures established in the initial case-management order. For example, the procedures might allow the movant to choose any hearing day that is at least 25 days after the date of service of the motion and allow any objection to be filed within 20 days after the date of service. On the applicable hearing date, the court then hears all motions timely filed by any party in interest in the case and noticed for that date. Exhibits I-7 through I-9 include provisions relating to omnibus hearing dates. Each motion should be accompanied by a proposed form of order.

The procedures may direct that if no objection to a motion is filed by the date by which objections are due, the movant may file and serve a certification of no objection with the court stating that no objection has been filed. If such a certification is filed and served, the court may enter the proposed order accompanying the motion without further hearing and, once the motion is entered, the hearing scheduled on the motion or application is cancelled without further notice. A form of certification of no objection is attached as Exhibit I-10.

The court may wish to consider requiring that debtor's counsel prepare and serve a proposed hearing agenda at least two business days before each omnibus hearing date. Such an agenda could include the following items:

- the docket number and title of each matter scheduled for hearing on that hearing date;
- a list of the papers filed in support or in opposition and their docket numbers;
- whether the matter is contested or uncontested;
- an estimate of the time required to hear each matter;
- other comments that will assist the court in organizing the docket for the day (such as whether a request for a continuance or withdrawal because of settlement is expected); and
- a suggested order in which the matters will be addressed.

A form of notice of proposed hearing agenda is attached as Exhibit I-11. The proposed hearing agenda is merely a proposal for the convenience of the court and counsel and is not intended to determine all matters to be heard on that day or whether any matters will be settled or continued. On the hearing date, the court may or may not accept the proposed hearing agenda suggested by counsel. However, absent an order allowing an expedited hearing as to matters not previously listed, the court may decide not to permit belated additions to the agenda.

It is useful to post the agenda on the court's website. This gives all interested parties notice of what will be heard on the next omnibus hearing date and an estimate of the time required. If the notice is posted on the website one or two business days prior to the omnibus hearing date, it is most likely to provide the desired notice while reflecting agreements that occur shortly before the hearing. It is even possible in some districts to have debtor's counsel post the agenda on the court's website directly so that court personnel need not be involved. This posting of the agenda on the website is not a substitute for the usual forms of notice of motions and hearings, but serves only as an informal guide to what will occur at the omnibus hearing.

If a matter is properly noticed for hearing and the parties reach agreement on a settlement prior to the hearing date, the parties may announce the settlement at the scheduled hearing. If the court determines that the notice of the motion and the hearing adequately informed interested parties of the potential effects of the settlement,

the court may approve the settlement at the hearing without further notice of the terms of the settlement itself.

The location of the motion hearings can present problems because of the large number of lawyers and parties frequently in attendance. If the regular courtroom of the bankruptcy judge is not adequate to accommodate the crowd, the district court may be willing to make a larger courtroom available. The judge may wish to specify where the debtor and committees will sit and where the parties addressing the court should stand. Certain sections of the courtroom may be reserved for counsel, the media, and the public.

Some courts permit the use of telephonic or videoconference appearances at conferences and hearings. Courts follow different procedures and use different technologies (e.g., traditional telephone services vs. Voice over Internet Protocol (VoIP) technology), and some set forth their procedures in local rules. Some courts allow telephonic or videoconference appearances by counsel or witnesses only in nonevidentiary matters and others only in uncontested matters. Most courts are allowing counsel to "listen in" so that they can keep up with progress in the case without attending if they do not intend to participate. The Federal Judicial Center recently held a roundtable and published a report on different methods of allowing participation by telephone, including VoIP and videoconferencing (*see* Roundtable on the Use of Technology to Facilitate Appearances in Bankruptcy Proceedings (Federal Judicial Center 2006)). Several different kinds of equipment and several vendors are available. The Administrative Office of the U.S. Courts recently negotiated national contracts for some of these vendors to provide telephone conferencing services for court proceedings. Detailed information concerning this service is located on the J-Net at http://jnet.ao.dcn/Procurement/Judiciary_Wide_Contracts.html#7a.

Courts use essentially two different methods for setting emergency and expedited hearings. Some courts allow the movant to set an expedited or emergency hearing on an omnibus hearing date without first seeking permission from the court. The local rule or administrative order usually requires the movant to set the hearing on the latest hearing date that will accommodate the emergency. In those courts, the first order of business in addressing the motion is to determine whether adequate notice of the motion and hearing has been given. Other courts require a separate motion for an emergency or expedited hearing, describing in detail why there is a need for expedited treatment and stating the time by which a hearing is required. The motion for an emergency or expedited hearing may be granted or denied by the bankruptcy judge without a hearing, although local practice often requires notice be provided. If the motion for an expedited hearing is granted, the judge may issue an order setting a hearing date. The order may briefly describe the relief requested, set the last date for objections to be filed, and state on whom objections should be served. At the emergency or expedited hearing, the movant should file a certificate with respect to service of the order.

Rules with Respect to Local Counsel. Many bankruptcy courts permit only members of the bar of the district court of which they are adjuncts to appear as counsel. Attorneys seeking to represent parties in interest in a bankruptcy case who are not admitted to the bar of the relevant district should seek admission *pro hac vice* in compliance with the local rules (which may require payment of a fee). Some districts do not require admission if counsel does not appear in person.

The Judge's Office. The bankruptcy judge may wish to consider designating one law clerk (if the judge has more than one) and one courtroom deputy clerk as having primary responsibility for the mega-case and make that designation known on the court's website. Interested parties then know whom they should (and should not) call with questions about the case. If the demands of the case are too heavy for the judge's existing staff, the judge might consider hiring an additional law clerk and courtroom deputy to work exclusively on the mega-case so long as the workload justifies their full-time assistance. The circuit executive may be able to make funds available to hire additional personnel. Some judges have successfully used law school interns to assist in mega-cases, often without pay. The Administrative Office has a program to assist in the authorization of a temporary courtroom deputy clerk or in the temporary assignment of a law clerk serving another judge (even one in a different district) to a bankruptcy judge in need of additional assistance.

Transcripts and Docketing. Counsel in a mega-case frequently wish to obtain transcripts of court proceedings promptly. Some courts have arranged for all hearings, conferences, and adversary proceedings to be transcribed promptly by having the court recorder send the tapes and notes to a transcribing agency by hand delivery or by overnight courier. The completed transcript is then returned to the court by the same method within a short period of time. The estate should pay for all transcripts. Lawyers for various parties may have a standing order with the transcribing agency for a transcript of every proceeding in the mega-case. Some courts use digital recordings so a recorded copy of the record can be obtained on compact disc quickly and inexpensively.

Prompt docketing of filings in a mega-case is also essential to smooth case management. All documents are readily available on the CM/ECF and PACER systems, and the docket text is searchable so that any interested party should be able to locate a specific document without difficulty.

Relations with the Press and Public. A bankruptcy mega-case tends to generate wide public interest. As a result, the court may receive many inquiries about the case from the media and from members of the public. Codes of conduct prohibit judges and clerks from commenting on pending cases. Therefore, such inquiries should generally be directed to the debtor's attorney or to the debtor's public relations firm (if one has been retained). If the judge wishes to make sure that the public understands a particular action taken in a mega-case, an explanation can be given on the record in open court.

The clerk's office can provide information about matters of public record and can provide information about how to access the docket and filed documents through the court's website or the PACER system. The court also can have the debtor set up a dedicated website with information about the case, including upcoming hearing dates. The clerk's office may also designate someone to coordinate with the media as to release of decisions and to provide a location for interviews with counsel.

The court also may find it useful to provide the media with general background information about bankruptcy cases. For example, the court may distribute fact sheets or post on its website information describing the general nature of Chapter 11 proceedings and how Chapter 11 differs from the more familiar Chapter 7.

Various parties may request that certain information filed in connection with the mega-case be excluded from public access by protective order. Generally all papers filed in a bankruptcy case are public records and should be available for inspection. Bankruptcy Code § 107(a). However, under Bankruptcy Code § 107(b) and Bankruptcy Rule 9018, on request of a party in interest the court must "protect an entity with respect to a trade secret or confidential research, development, or commercial information" or "protect a person with respect to scandalous or defamatory matter" contained in a paper filed in the bankruptcy case. The court may also choose to enter a protective order on its own motion. The sealing of records should be rare and should be ordered only upon satisfaction of the standards set forth in the Code and the Rule.

The 2005 Amendments also permit the bankruptcy court, for cause, to protect an individual with respect to information contained in filed papers the disclosure of which "would create undue risk of identity theft or other unlawful injury to the individual or the individual's property." However, such information may be made available to a governmental unit acting pursuant to its policy or regulatory powers on an ex parte application.

II. Early Issues

Dealing with Special Interest Groups

One of the key factors leading to the designation of a case as a mega-case is the large number of parties in interest. Although the specific parties involved in mega-cases vary, certain categories of parties are involved in many mega-cases, and each type has distinct issues that are frequently presented.

Governmental Units. In most respects, governmental units are treated as any other party in interest in a bankruptcy case. Nevertheless, the Bankruptcy Code affords governmental units a preferred status for some purposes. For example, certain taxes incurred by the estate and other amounts related thereto are defined as "administrative expenses" under Bankruptcy Code §§ 503(b)(1)(B) and (C), and many unsecured claims of governmental units for taxes (income, property, withholding, employment, excise, customs duties, and penalties) are given priority treatment in distribution of the property of the estate under sections 507(a)(8) and 507(c). Perhaps the most significant provision favoring the government at the early stages of a bankruptcy case is Bankruptcy Code § 362(b)(4), which excludes from the scope of the automatic stay created by the filing of the bankruptcy petition the commencement or continuation of actions or proceedings by governmental units to enforce their police or regulatory power.

The "police or regulatory power" exception allows the enforcement of laws affecting health, welfare, morals, and safety despite the pendency of the bankruptcy proceeding. The exception applies, for example, to suits to determine a federal income tax exemption, to enforce federal labor laws, to enforce state bar disciplinary rules, to enforce federal employment discrimination laws, and to enforce state consumer protection laws. In determining whether the governmental action falls within the exception, bankruptcy courts generally look at whether the government action related primarily to the protection of the government's pecuniary interest in the debtor's property or rather relates to matters of public health and safety. *See, e.g.*, City & County of San Francisco v. PG & E Corp., 433 F.3d 1115, 1124 (9th Cir. 2006); *In re* McMullen, 386 F.3d 320, 325 (1st Cir. 2004). If the action seeks to protect the government's pecuniary interest, the section 362(b)(4) exception does not apply. On the other hand, if the suit seeks to protect public safety and welfare, the exception does apply. The purpose of the "pecuniary purpose" test is to prevent actions that would allow a governmental unit in its capacity as a creditor of the estate to obtain an advantage over competing creditors or potential creditors in the bankruptcy proceeding.

Even if the bankruptcy court concludes that the regulatory action is not barred by the automatic stay because it falls within the scope of section 364(b)(4), some courts

have recognized that the bankruptcy court still has the inherent power to enjoin the action under Bankruptcy Code § 105. *See, e.g., In re* Corporacion de Servicios Medicos Hospitalarios de Fajardo, 805 F.2d 440, 449 n.14 (1st Cir. 1986); *In re* First Alliance Mortgage Co., 264 B.R. 634, 651–52 (C.D. Cal. 2001). However, the Bankruptcy Code clearly contemplates that governmental regulatory actions may proceed during the typical bankruptcy case. Therefore, the authority to enjoin a governmental unit from pursuing an action that Congress has not automatically barred should be exercised only in extraordinary circumstances and only after considering all relevant factors, including the possible damage that may result from the granting of a stay, the hardship or inequity that a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law that could be expected to result from a stay. The burden of establishing that such an injunction should be granted rests with the debtor, and the debtor will have to show that the usual standards for issuance of an injunction are satisfied under Rule 65 of the Federal Rules of Civil Procedure (made applicable to adversary proceedings in bankruptcy cases by Bankruptcy Rule 7065), including likelihood of success on the merits, irreparable harm without the injunction, balance of the harms favoring the moving party, and public interest favoring injunctive relief. The burden is more likely to be met when there is a clear reorganization goal that is threatened by the government action.

When the governmental unit seeks to enforce regulatory powers conferred by state law, the bankruptcy court must consider the impact of 28 U.S.C. § 959, which requires a trustee or debtor in possession to "manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." This means that the debtor has to comply with all applicable health and safety codes, building codes, business license requirements, and environmental and other regulatory obligations of business or property operations if it conducts business during the reorganization. The pending bankruptcy case does not relieve a debtor (or the trustee) from the obligation to comply with state law, and that obligation can generally be enforced through regulatory proceedings notwithstanding the automatic stay. If a state regulatory proceeding seeks to enforce an obligation described in section 959(b), the proceeding should be permitted to go on.

If the Chapter 11 case involves a debtor that operates a business that is subject to pervasive federal or state regulation, the bankruptcy judge must have an adequate understanding of the applicable regulatory scheme. If the regulatory law is particularly complicated and a specific issue arises in connection with an adversary proceeding or contested matter for which the judge needs independent expert assistance, the judge may wish to appoint an examiner or court expert in the area to provide that assistance. The cost of such an examiner or expert is borne by the estate.

Unions. When the business enterprise involved in a mega-case has collective bargaining agreements, the labor unions subject to such agreements are likely to become significant players in the case. Among the issues the court may have to confront are whether the court should grant a motion under Bankruptcy Code § 1102(a)(2) to appoint a separate committee to represent employees or, if not, whether the union is eligible to sit on the creditors' committee, *see In re* Altair Airlines, Inc., 727 F.2d 88 (3d Cir. 1984), and whether the union may assert claims on behalf of its membership, *see* Office & Professional Employees International Union, Local 2 v. F.D.I.C., 962 F.2d 63 (D.C. Cir. 1992).

The existence of collective bargaining agreements also may give rise to substantive issues with respect to their possible modification or termination. Bankruptcy Code § 1113 provides that a Chapter 11 debtor (or trustee) may reject a collective bargaining agreement "only in accordance with the provisions of this section." If the debtor believes that its obligations under a collective bargaining agreement would inhibit its effective reorganization, it must first make a good-faith effort to negotiate a modification of the contract with an authorized representative of its employees. If they cannot agree, the bankruptcy court may, after notice and a hearing, permit the debtor to reject the collective bargaining agreement under section 1113 only if (1) the debtor's proposal provided for "necessary modifications . . . that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably"; (2) the employees' authorized representative has refused to accept the debtor's proposal "without good cause"; and (3) "the balance of the equities clearly favors rejection" of the collective bargaining agreement.

Another issue that may arise is a request by the debtor to enjoin collective bargaining job actions. Section 4 of the Norris-LaGuardia Act explicitly withdraws jurisdiction from all courts of the United States, including bankruptcy courts, to issue injunctions against strikes "in any case involving or growing out of a labor dispute." 29 U.S.C. §104. If the bankruptcy court determines that the strike involves a "labor dispute" as defined in the Norris-LaGuardia Act, it has no power to enjoin the action unless the collective bargaining agreement contains a mandatory grievance adjustment or arbitration provision. *See* Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970).

The bankruptcy court has jurisdiction under Bankruptcy Code § 105 to enjoin proceedings by the National Labor Relations Board involving alleged unfair labor practices, at least where those proceedings threaten estate assets. *See* N.L.R.B. v. Superior Forwarding, Inc.,762 F.2d 695 (8th Cir. 1985). However, as discussed above with respect to other governmental units, the court's power to enjoin proceedings should be exercised sparingly.

Pension Plans. Many mega-cases involve employers who are facing significant obligations to retired employees for health, disability, or death benefits under pension plans.

Bankruptcy Code § 1114(e) requires the debtor in possession or the trustee to timely pay—and bars them from modifying—retiree benefits unless "necessary to permit the reorganization of the debtor" and after rejection "without good cause" by an "authorized representative" of the retirees of a proposal that provides for necessary modifications. Section 1114 does not, however, preclude termination of benefits in accordance with the contractual provisions of the plan, nor does it guarantee that the debtor will have adequate resources to meet its obligations under the plan.

Under the 2005 Amendments, if the debtor modified retiree benefits during the 180-day period ending on the date of the filing of the petition and was insolvent at the time of such modification, the court is directed, upon motion of a party in interest, to reinstate the benefits as of the date of the modification to their preexisting status "unless the court finds that the balance of the equities clearly favors such modifications." Bankruptcy Code § 1114(l).

When the debtor is unable to satisfy its pension obligations, the Pension Benefit Guaranty Corporation (PBGC) may become active in the case. The PBGC is a federal corporation that was established by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1301–1461, for the purpose of administering the single-employer pension plan termination insurance program. Under this insurance program, the PBGC guarantees the payment of certain minimum pension benefits to plan beneficiaries in the event that a covered plan terminates with insufficient assets to pay the benefits in full. If a plan terminates with insufficient assets to pay the minimum guaranteed level of benefits (either by voluntary action of the plan administrator or by involuntary procedures instituted by the PBGC), the PBGC typically becomes trustee of the plan, takes over the assets and liabilities of the plan, and pays the guaranteed benefits to plan participants out of funds remaining in the plan and out of its own funds to cover any insufficiency. ERISA provides that the PBGC may bring involuntary termination procedures when the plan is unable to pay benefits when due and when the PBGC faces an unreasonable increase in liabilities with respect to the plan if the plan is not terminated. Upon termination of the plan, benefits for plan participants cease to accrue.

Issues that arise when the PBGC becomes involved in the mega-case include the amount of its claim against the estate, the priority of that claim, the date of termination of the plan, and the calculation of benefits due to the participating employees. The PBGC can be one of the largest creditors of a debtor in a mega-case.

Committees. The U.S. trustee is directed by Bankruptcy Code § 1102(a)(1) to "appoint a committee of creditors holding unsecured claims" and is authorized to "appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate." Upon request of a party in interest, the

bankruptcy court may also order the appointment of additional committees "if necessary to assure adequate representation of creditors or of equity security holders." Bankruptcy Code § 1102(a)(2). Representation by an official committee provides significant benefits to the creditors or equity holders involved, as committees are provided the powers conferred by Bankruptcy Code § 1103(c), as well as the right to employ attorneys, accountants, or other advisors under Bankruptcy Code § 1103(a) at the expense of the estate. Bankruptcy Code §§ 330(a), 503(b)(2).

Because a mega-case involves large numbers of interested parties, many with disparate interests, the bankruptcy judge may be asked to direct the U.S. trustee to appoint additional committees composed of their constituents. Requesting parties may include subordinated debt holders, trade creditors, preferred stockholders, and holders of common shares, among others. In considering whether to appoint additional committees, courts have to balance the administrative expense of such committees and the possibility that they may make it more difficult to achieve a consensual plan against the possibility that adequate representation is not available otherwise. The inquiry is case-specific, but courts generally consider (1) the number of persons in the group requesting committee designation; (2) the complexity of the case; (3) whether the cost of the additional committee outweighs the concern for adequate representation; and (4) whether the proposed class is likely to receive a meaningful distribution under a strict application of the absolute priority rule. *See, e.g.*, *In re* Enron Corp., 279 B.R. 671, 685 (Bankr. S.D.N.Y. 2002); *In re* Williams Communications Group, Inc., 281 B.R. 216, 220, 223 (Bankr. S.D.N.Y. 2002). As to additional committees, particularly equity committees where the debtor's solvency is doubtful, the court may wish to consider capping the fees of the committee's professionals. *See In re* Federal Mogul-Global, Inc., 348 F.3d 390 (3d Cir. 2003).

Many courts have found it beneficial to limit the number of committees appointed or to set a deadline for requesting the appointment of an official committee to prevent disruptive motions on the eve of plan confirmation. Exhibit II-1 is a sample order denying a motion to appoint a committee of equity holders.

Even after appointing committees initially, under Bankruptcy Code § 1102(a)(4) the court may order the U.S. trustee to change the membership of an appointed committee if the court "determines that the change is necessary to ensure adequate representation of creditors or equity security holders."

Under the 2005 Amendments, any appointed committee is required to provide access to information to the creditors represented by the committee but not serving on the committee itself, and the committee must solicit and receive comments from such creditors. Bankruptcy Code § 1102(b)(3). The committee might be encouraged to create its own website to post and receive information with a link from the official case website, if one exists. In a mega-case involving a public company, the committee's obligation to provide information to creditors may cause problems with the dissemination of nonpublic, confidential information concerning the debtor. Conse-

quently, a motion may be filed by the debtor or committee seeking to restrict the information that the committee may disseminate notwithstanding Bankruptcy Code § 1102(b)(3).

Patients. If the debtor is a "health care business" (defined in Bankruptcy Code § 101(27A)), the 2005 Amendments include new provisions to protect the rights of patients. Under Bankruptcy Code § 333, not later than 30 days after the commencement of the case the court must order the appointment of an "ombudsman to monitor the quality of patient care and to represent the interests of the patients" unless the court finds that the appointment "is not necessary for the protection of patients under the specific facts of the case." Bankruptcy Code § 333(a)(1). The ombudsman is a disinterested person appointed by the U.S. trustee. *Id*. § 333(a)(2)(A). The ombudsman is required to report to the court regarding the quality of patient care provided to patients of the debtor not later than 60 days after appointment, and not less frequently than at 60-day intervals thereafter. *Id*. § 333(b)(2). The ombudsman is also required to file a report with the court if he or she determines "that the quality of patient care provided to patients of the debtor is declining significantly or is otherwise being materially compromised." *Id*. § 333(b)(3).

Executives and Employees. Early in the mega-case the debtor will frequently file a motion seeking court approval under Bankruptcy Code § 363(b) for key employee retention plans under which the debtor offers incentive compensation and severance payments to certain executives and employees in order to boost morale and retain their services during the reorganization. Such plans typically provide increased compensation to a limited number of key employees during the case and guarantee these employees an "emergence bonus" if they are still employed when the case is confirmed and severance payments if they are terminated without cause.

Under the 2005 Amendments, Congress has limited the discretion of the bankruptcy courts to approve such arrangements. Bankruptcy Code § 503(c)(1) precludes transfers to or obligations incurred for the benefit of insiders as retention inducements unless either they have a "bona fide job offer from another business at the same or greater rate of compensation" and "the services provided by the person are essential to the survival of the business." Even in such cases, the amount of the transfer or obligation is capped at "an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred"; if there were no such similar transfers or obligations for nonmanagement employees during the calendar year, the cap is 25% of any transfers made or obligations incurred for the benefit of the insider for any purpose during the prior calendar year.

Severance payments to insiders are also limited by Bankruptcy Code § 503(c)(2). Such payments may not be made unless both "the payment is part of a program that is generally applicable to all full-time employees" and "the amount of the payment is

not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made." Bankruptcy Code § 503(c)(2).

Section 503(c)(3) allows other payments to senior management so long as those payments are justified by the facts and circumstances of the case. The court may, therefore, get a motion to approve a "success fee" to senior management payable on confirmation of a plan, consummation of a sale, or the achievement of specified operating results.

In light of the strict statutory limits on such payments and obligations, the court needs to ensure that the debtor meets its burden of meeting the requirements for any incentive plan. Such motions should be supported by evidence with respect to the following: the identities of the covered employees; their present positions and responsibilities; any claims or interests they hold in the case; their length of service and work experience; their present compensation (including bonuses, commissions, and benefits); the requested compensation (including bonuses, commissions, and benefits); the total cost to the debtor of the requested incentives; how the requested incentives compare to incentives given to nonmanagement employees and to the affected management employees in the past year; and the benefits to the estate of approving the motion and the costs of its denial.

Because many parties in interest may have objections to such a plan, a motion for approval should not be handled as a first day order or on an expedited basis with limited notice and opportunity to be heard.

Handling Early Issues

In the early days of a complex Chapter 11 case, the bankruptcy judge will be asked to rule on many substantive and procedural issues. Although some of those issues will be the same as those presented in a routine Chapter 11 case, in some cases the issues are different, and even when they are not, the size of the case may affect the impact of the court's ruling and the urgency with which it is sought. This section of the Guide covers some of these issues. The court's ruling with respect to any of these issues will, of course, be dictated by the facts of the case, the governing law, and local rules in the jurisdiction, and no attempt is made here to suggest preferred outcomes.

Joint Administration. Debtors in related bankruptcy cases typically seek joint administration of their cases under Bankruptcy Rule 1015(b). The Rule requires that prior to entering an order providing for joint administration, the court consider "protecting creditors of different estates against potential conflicts of interest." Therefore, before ruling on the motion the court may wish to receive detailed information about the equity ownership of each of the debtors, the existence of any inter-debtor claims or obligations, any guaranties by one debtor of obligations owed by a related debtor

or equity holder, and any inter-debtor transfers within one year before the order for relief, to the extent such information is available.

Bankruptcy Rule 1015(b) does not specify the effects of granting joint administration. The joint administration of a mega-case consisting of related cases can be relatively benign if limited to procedural matters and generally allows the case to be administered more expeditiously and at less cost than separate administration of each related case. Joint administration would include such efficiencies as a single mailing matrix and joint hearings. More extensive joint administration might have a more serious impact on case prosecution, such as having a single debtor's counsel, a single creditors' committee, a single disclosure statement and plan of reorganization, and a single claims docket. Some courts grant limited procedural joint administration at the first day hearings and defer more substantive issues.

It is important to distinguish joint administration from consolidation. Consolidation of cases implies a unitary administration of the estate. Bankruptcy Rule 1015(a) permits consolidation if two or more petitions are pending against the same debtor, but the rule neither authorizes nor prohibits the consolidation of cases involving two or more separate debtors. In contrast, Bankruptcy Rule 1015(b) allows joint administration of "a husband and wife," "a partnership and one or more of its general partners," "two or more general partners," or "a debtor and an affiliate." Whatever the court decides, the order providing for joint administration or consolidation should spell out clearly what "joint administration" or "consolidation" means in that case.

For ease of administration, jointly administered cases might be docketed in the name of any publicly traded debtor.

Prepackaged or Prenegotiated Plans. For some debtors, the filing of a bankruptcy petition is the culmination of a reorganization process rather than the beginning. In contrast to typical Chapter 11 cases where a plan and disclosure statement are filed many months, sometimes years, after the cases are filed, some mega-cases are "prepackaged bankruptcies," or "prepacks," where the plan and disclosure statement are prepared and sufficient favorable votes on the plan are solicited and obtained before the Chapter 11 case begins, leading to a prompt plan confirmation. A closely related structure is the "prenegotiated" plan, in which the details of a plan are negotiated prior to the filing of the petition but solicitation does not occur until after the filing.

Prepackaged plans are specifically contemplated in the Code as is evidenced by

- Bankruptcy Code § 341(e), which allows the court to order the U.S. trustee not to convene a section 341 meeting if the debtor has filed a plan as to which acceptances have been solicited prior to commencement of the case;
- section 1102(b)(1), which allows a prepetition creditors' committee to act as the creditors' committee in bankruptcy if it was fairly chosen and is representative of the different kinds of claims in the case;

- section 1121(a), which allows the debtor to file a plan with its voluntary Chapter 11 petition;
- section 1125(g), which provides for acceptance or rejection of a plan pursuant to a prepetition solicitation complying with applicable nonbankruptcy law; and
- section 1126(b), which provides for prepetition solicitation in accordance with any applicable nonbankruptcy law or otherwise after disclosure of adequate information as defined in section 1125(a)(1).

Consistent with the Code's recognition of prepacks, some courts have established expedited procedures for the early approval of disclosure statements, solicitation of acceptances, and confirmation of such plans. An example of a general order with respect to procedures relating to prepackaged Chapter 11 cases is attached as Exhibit II-2.

The central feature of the judicial role in a prepackaged bankruptcy is a combined hearing to deal with both disclosure requirements and confirmation of the plan, generally within 90 days after the filing of the petition. A sample order for a disclosure and confirmation hearing on a prepackaged plan is attached as Exhibit II-3. With a prepackaged bankruptcy, creditors and other parties in interest are denied the opportunity to address the adequacy of the proposed disclosure statement and the solicitation process until after the solicitation has already occurred. Although the bankruptcy court may feel more pressure under these circumstances to conclude that the process meets the requirements of the Code, the court must review the proposed disclosure statement and the completed solicitation process with the same care as it would have done in advance to verify that the solicitation either meets the requirements of applicable nonbankruptcy law or that the disclosure statement contains adequate information.

The court also must ensure that substantially all impaired creditors received adequate notice of the plan and the disclosure statement and had an opportunity to object to the disclosure statement and to vote on and object to the plan. At the confirmation stage of a prepackaged bankruptcy, the court evaluates the process of solicitation in determining whether the acceptances obtained are valid. Bankruptcy Rule 3018(b) requires that holders of claims or interests who accept or reject the plan before the case commences must be record holders of their positions on the date specified in the solicitation, and the rule disallows their votes if "the court finds after notice and hearing that the plan was not transmitted to substantially all creditors and equity security holders of the same class, that an unreasonably short time was prescribed for such creditors and equity security holders to accept or reject the plan, or that the solicitation was not in compliance with § 1126(b) of the Code." The court may wish to require a detailed description of all communications between the debtor and creditors

and/or holders of equity interests during the prepetition reorganization process and the dates of such communications.

Prenegotiated or prearranged plans differ from prepackaged plans only insofar as actual solicitation of votes has not occurred prior to filing. However, the prospective debtor negotiates with the major creditor constituencies about the terms of a proposed plan of reorganization and obtains their agreement that the terms are acceptable. Their agreement may be embodied in a "lock-up" or "plan-support" agreement that commits them to support the proposed plan, perhaps by using their "best efforts" to obtain confirmation, or by not voting to reject it or by not supporting a competing plan. Although such prepetition lock-up agreements have been challenged under Bankruptcy Code §§ 1125(b) and 1126(e), they have been upheld. *See In re* Bush Industries, Inc., 315 B.R. 292 (Bankr. W.D.N.Y. 2004); *In re* Texaco Inc., 81 B.R. 813 (Bankr. S.D.N.Y. 1988). Lock-up agreements executed after the filing of the petition but prior to approval and dissemination of a disclosure statement may not be permissible. *See, e.g., In re* Stations Holding Co., 2002 WL 31947022 (Bankr. D. Del. 2002); *In re* NII Holdings, Inc., 288 B.R. 356 (Bankr. D. Del. 2002). Lock-up agreements may become less common with the enactment of Bankruptcy Code § 1125(g), which recognizes the validity of prepetition solicitation of votes on a prenegotiated plan.

Prepackaged and prenegotiated plans are perceived to have significant advantages over traditional plans of reorganization because they offer more certainty and control to the debtor and tend to reduce the time and expense of the case, therefore allowing the debtor to commence its reorganized operations as soon as possible. However, such plans create heightened concerns about the due process rights of the creditors and interest holders of the debtor. The court must protect these rights even at the risk that the plan proponent must begin the process again after the filing.

Sale of All or Substantially All Assets Under Section 363. Increasingly, Chapter 11 is being used as a mechanism for consummating a sale of all or substantially all of the assets of the debtor free and clear of prepetition claims. Although such a sale may be the subject of a prepackaged plan of reorganization, it also may be sought through motion under Bankruptcy Code § 363 early in the case but before a plan of reorganization has been filed. There are different views about whether the sale of all assets, outside of a plan of reorganization in a non-emergency situation, is authorized by the Bankruptcy Code. *Compare In re* White Motor Credit Corp., 14 B.R. 584 (Bankr. N.D. Ohio 1981) *with* Stephens Industries, Inc. v. McClung, 789 F.2d 386 (6th Cir. 1986); *In re* Lionel Corp., 722 F.2d 1063 (2d Cir. 1983); *In re* Engineering Products Co., Inc., 121 B.R. 246 (Bankr. E.D. Wis. 1990); *In re* Naron & Wagner, Chartered, 88 B.R. 85 (Bankr. D. Md. 1988). In jurisdictions that approve such sales, however, such a sale effectively ends the reorganization and transforms the bankruptcy case into a negotiation over allocation of proceeds. Therefore, the

bankruptcy court has an obligation to ensure that any such sale is conducted in a manner that protects the interests of all creditors and equity holders.

Exhibit II-4 contains sample guidelines adopted with respect to early dispositions of all or substantially all of the debtor's assets under section 363.

Three major issues are presented by a contemplated sale of the debtor's assets. First, the court should ensure that the motion for the order authorizing the debtor to sell contains adequate information with respect to the proposed sale to enable all interested parties to file meaningful objections. Any proposed sale agreement should be attached, and among the issues that might be specifically addressed in the motion are:

- any contingencies to the sale;
- an estimate of administrative expenses relating to the sale and the source of payment of those expenses;
- an estimate of the gross and net proceeds of the sale, with an itemization and explanation of all deductions;
- a description of the debtor's debt structure, including the amount of debtor's secured debt, priority debt, and general unsecured claims;
- an explanation of why the assets must be sold on an expedited basis and a discussion of alternatives to the sale;
- a description of the negotiations leading up to the sale agreement and efforts made to obtain offers from other parties, including a description of any other offers;
- a description of the methods and length of time used for marketing the assets;
- identification of the proposed buyer and description of any relationships between the buyer and its insiders and the debtor, the creditors, and any other party in interest and their respective insiders, attorneys, financial advisers, and accountants;
- any post-sale relationship or connection with the debtor or its insiders contemplated by the buyer;
- any topping fee or break-up fee contemplated by the sale agreement (see discussion below);
- if a creditors' committee existed prepetition, the members of the committee and their affiliations; and
- if applicable, a request for appointment of a consumer privacy ombudsman under section 332.

Second, certain provisions of the proposed sale agreement may be subject to heightened scrutiny. The sale agreement should not act as a "sub rosa" plan of reorganization, dictating the terms of the plan the debtor will ultimately file without compliance with the confirmation requirements of Chapter 11 for approval of the sale

agreement in which those terms are contained. *See In re* Braniff Airways, Inc., 700 F.2d 935, 939 (5th Cir. 1983).

Some courts will also conduct a separate inquiry into the appropriateness of any proposed topping fee or break-up fee (sometimes denominated a "liquidated damages" clause). When an initial bidder for the assets of the debtor, after performing its due diligence inquiry, is outbid by a second bidder, the initial bidder may be awarded a break-up fee. The justification for such fees is that in their absence a prospective purchaser of a Chapter 11 debtor's assets would be unwilling to expend the time and resources necessary to perform the due diligence analysis if the purchaser could merely become a "stalking horse" for a higher bid.

Although the debtor may be unable to obtain an initial bid for its assets without ensuring that the initial bidder receives a break-up fee (in which event the break-up fee serves a valuable purpose in the reorganization), the break-up fee may also serve simply to give the initial bidder an advantage over others by making the cost of the acquisition higher for the later prospective purchasers, which works to the disadvantage of the debtor's estate. Even if the break-up fee is not designed impermissibly to favor a specific bidder, the fee may be unnecessary to accomplish the goal of inducing bids for the assets. If the cost of acquiring the debtor, including the cost of making the bid, is less than the estimated value the purchaser expects to gain from acquiring the company, it will bid whether or not a break-up fee is offered. Whether a break-up fee adds value to the estate is a critical factor in determining whether to approve it. A break-up fee is particularly suspect if there are already other willing buyers. *See generally,* Bruce A. Markell, *The Case Against Breakup Fees in Bankruptcy,* 66 Am. Bankr. L.J. 349, 359 (1992).

As a result, the court may want to require any request for approval of a sale agreement that includes a topping or break-up fee be supported by a statement of the precise conditions under which the fee would be payable and the factual basis on which the seller determined that the provision was reasonable. The court may also require that the request disclose the identities of other potential purchasers, the offers made by them (if any), and the nature of the offers. In considering whether to approve the fee, the court may wish to consider whether

- the relationship of the parties who negotiated the break-up fee is tainted by self-dealing or manipulation;
- the fee hampers, rather than encourages, bidding;
- the amount of the fee is unreasonable relative to the proposed purchase price;
- the request for a break-up fee serves to attract or retain a potentially successful bid, establish a bid standard or minimum for other bidders, or attract additional bidders;
- the fee requested correlates with a maximization of value to the debtor's estate;

- the principal secured creditors and the official creditors' committee are supportive of the concession;
- safeguards beneficial to the debtor's estate are available; and
- there is a substantial adverse impact on unsecured creditors, where such creditors are in opposition to the break-up fee.

See In re O'Brien Environmental Energy, Inc., 181 F.3d 527 (3d Cir. 1999); *In re* Integrated Resources, Inc., 147 B.R. 650 (S.D.N.Y. 1992).

Although break-up or topping fees have attracted the most scrutiny from bankruptcy courts in connection with proposed sales of all or substantially all of the assets of Chapter 11 debtors, the court also should examine the proposed sale order for inappropriate findings, releases, and injunctions that are not contemplated by the terms of Bankruptcy Code § 363. Bankruptcy lawyers have been known to draft lengthy (and often unintelligible) sales orders to include provisions that alter the Code and Bankruptcy Rules through over-broad definitions, as well as including third-party releases and exculpation clauses that may run afoul of Bankruptcy Code § 524(e). There should be an evidentiary basis for any proposed finding of "good faith" for purposes of Bankruptcy Code § 363(m). *See, e.g.*, *In re* M Capital Corp., 290 B.R. 743 (9th Cir. BAP 2003).

Third, the court will generally want to ensure that the sale procedures enable competing bidders to present offers for the assets at an auction or, if no auction is contemplated, at the time of the hearing on the sale motion. When competitive bidding is contemplated, the motion to sell and the notice of hearing should be accompanied by a motion to approve sale or bid procedures. A hearing on the procedures motion should be held sufficiently in advance (perhaps 10–20 days) of the date of the auction or presentation of competing bids as to enable other potential acquirors an opportunity to analyze the situation and prepare a competing bid. The procedures motion should describe such matters as the following:

- the time and place of the bidding process and whether telephonic participation will be permitted;
- the amount of any initial bid and whether a topping or break-up fee has been approved;
- the amount of any required overbid protection (overbid protection means that any new bids to purchase the property must represent a specified incremental increase over the initial bidder's price in order to be accepted);
- the amount of subsequent bidding increments;
- any right of first refusal or right to match previous bids offered to any party;
- the amount and form of any required bid deposits and the manner and timing of the return of bid deposits to unsuccessful bidders;

- whether bids will be accepted for less than all assets (i.e., whether bidding "in lots" rather than bidding only on the whole will be considered);
- the effect of the winning bidder's failure to close (e.g., loss of bid deposit, liability for other damages, obligations of next highest bidder to close);
- availability of due diligence information to bidders; and
- summary of essential terms of any purchase agreement.

A hearing on such a procedures motion may generally be scheduled on an expedited basis if necessary. If the court approves the procedures motion, the hearing on the motion to sell should be scheduled as soon as practicable thereafter. Competing bids are generally entertained at that hearing on the sale motion. Any prospective bidder should be prepared to disclose any financial contingencies associated with its offer and to demonstrate to the satisfaction of the court, through an evidentiary hearing, that it is able to consummate the transaction if it is the successful bidder.

The 2005 Amendments have added limitations on the sale or lease of "personally identifiable information" (defined in Bankruptcy Code § 101(41A)) by a debtor who offers a product or a service to individuals under a policy prohibiting the transfer of such information to nonaffiliated persons. In such cases, Bankruptcy Code § 363(b)(1) requires that the sale or use of such information either be consistent with the policy or the court must appoint a "consumer privacy ombudsman" under Bankruptcy Code § 332, and the sale or lease can occur only if the court approves it, taking into account "the facts, circumstances, and conditions of such sale or such lease" and finding that it would not violate applicable nonbankruptcy law. Under Bankruptcy Code § 332(b), the consumer privacy ombudsman may be heard at the hearing and may present information on

- the debtor's privacy practice;
- the potential losses or gains of privacy to consumers if the sale or lease is approved;
- the potential costs or benefits to consumers if the sale or lease is approved; and
- the potential alternatives that would mitigate potential privacy losses or potential costs to consumers.

If the debtor is not a moneyed, business, or commercial corporation or trust, the 2005 Amendments allow the use, sale, or lease of property of the debtor only "in accordance with applicable nonbankruptcy law that governs the transfer of property by [such] a corporation or trust." Bankruptcy Code § 363(d)(1). Satisfaction of this requirement is now a condition to confirmation under Bankruptcy Code § 1129(a)(16).

Use of Cash Collateral and Debtor-in-Possession Financing. One of the most pressing initial concerns of a Chapter 11 debtor is access to cash. Although some debtors who file for bankruptcy protection have unencumbered cash, accounts, and

proceeds available to finance their operations, others generate cash that is subject to prepetition security interests of creditors and can use it only pursuant to the terms of Bankruptcy Code § 363(c)(2), or they must seek new financing sources through debtor-in-possession financing secured under Bankruptcy Code § 364. Any motion with respect to use of cash collateral or to obtain postpetition credit presents procedural and substantive issues.

Procedurally, the court must first determine when to rule on such a motion. Debtors frequently file motions for the entry of an order approving an agreement to use cash collateral or to obtain credit on an expedited basis early in the case, before the organizational meeting of the creditors' committee and before the section 341 meeting is held. Such agreements are the result of negotiations between a creditor and the debtor, both of whom will be supporting the request for immediate entry of an order approving their efforts.

When such motions are filed with the court on or shortly after the date of the filing of the petition, the court may choose to grant only interim relief under Bankruptcy Rule 4001(c)(2) with respect to the motion in order to avoid immediate and irreparable harm to the estate pending a final hearing. By granting interim relief, the court allows the debtor access to cash but defers approving any substantive terms of the financing arrangement that justify closer scrutiny, as discussed below. A final hearing on the motion can then be held after notice and hearing pursuant to Bankruptcy Rule 4001, at least 15 days after service of the motion.

Substantively, the judge must consider whether the provisions included in the proposed order are appropriate. Some courts have identified for the benefit of bankruptcy lawyers the provisions they generally will not approve in such orders. Exhibit II-5 provides one court's guidelines. Other courts do not categorically disapprove such provisions, but require that any such included provisions be identified by the movant, with the location of the provision in the agreement specified (perhaps in a cover sheet). The court may then consider whether to approve the provision based on the facts and circumstances of the specific case. Exhibit II-6 provides a local rule taking this approach. The Judicial Conference Advisory Committee on Bankruptcy Rules has proposed amendments to Bankruptcy Rule 4001(c), which will become effective December 1, 2007, absent contrary congressional action, that would mandate such disclosure in any motion for authority to obtain credit. The proposed amendments also require a concise statement (no more than five pages) of the relief requested and a proposed order, as well as more extensive notice to parties in interest. The Committee has also proposed similar amendments to Bankruptcy Rule 4001(b) with respect to motions to use cash collateral.

Where the court does not automatically disallow the following provisions, the movant will generally have to show the necessity of including them:

- cross-collateralization of prepetition debt of a prepetition creditor, that is, securing prepetition debt with postpetition assets in which the secured party would not otherwise have a security interest by virtue of its prepetition security agreement or applicable law;
- "roll-ups" of prepetition debt, meaning the application of proceeds of postpetition financing to pay, in whole or in part, prepetition debt;
- provisions or findings of fact that purport to bind the estate or all parties in interest with respect to the validity, perfection, extent, or amount of the secured creditor's prepetition lien or debt or that waive or release any or all claims against the secured creditor without giving parties in interest a reasonable period to investigate the facts and bring any appropriate proceedings to challenge those provisions or findings (generally 60–90 days);
- provisions that seek to waive the estate's rights to a surcharge under Bankruptcy Code § 506(c);
- provisions granting a lien on the debtor's claims and causes of action arising under Bankruptcy Code § 544, 545, 547, 548, 549, 553(b), 723(a), or 724(a) and the proceeds thereof, or a superpriority administrative claim payable from the proceeds of such claims and causes of action;
- provisions providing less-favorable treatment for professionals retained by a creditors' committee than the treatment provided for the professionals retained by the debtor with respect to a professional fee carve-out;
- provisions providing the creditor relief from the automatic stay without further notice, order, or hearing upon breach of the cash collateral or financing order or agreement;
- provisions that prime any secured lien, without the consent of the creditor whose liens are primed;
- provisions that limit or restrict the right of a debtor or any other party in interest to submit a plan of reorganization, or which would affect the terms of any such plan; and
- provisions waiving, modifying, or limiting the applicability of nonbankruptcy law relating to the perfection of a lien on property of the estate, or on the foreclosure or other enforcement of such a lien.

Problematic recitations in a proposed order include those that incorporate specific sections of the underlying agreements without describing their effect; those indicating that the court has examined all of the underlying agreements or approves of their terms; statements that the interested parties have had "sufficient and adequate" notice

or opportunity to object; and lengthy recitations of fact or any other unnecessary or unduly verbose provisions.

In addition to highlighting any special provisions, perhaps in a cover memorandum or introductory statement, a motion seeking use of cash collateral or credit should set forth the essential terms of the arrangement, including the following:

- the total dollar amount requested and how much of that amount is "new" money;
- the debtor's proposed budget for the use of funds;
- a certification by the debtor that the budget includes all administrative claims that will accrue during the relevant period;
- an estimate of the value of the collateral that secures the creditor's interest;
- the maximum borrowing available on an interim and final basis;
- the borrowing conditions, interest rate, fees, costs, or other expenses to be borne by the debtor;
- maturity of the debt;
- limitations on the use of the funds;
- events of default; and
- the protections to be given to the creditor under Bankruptcy Code § 363 or 364.

How a judge handles an early motion with respect to cash collateral or the extension of credit may provide a signal to the parties indicating how the judge will approach other submissions made in the case. If the judge looks carefully at any such motion and refuses to provide broader relief than that to which the parties are entitled under the Bankruptcy Code, the parties will know that subsequent submissions are likely to encounter the same scrutiny.

Payment of Employees. One of the debtor's early motions in a mega-case may be one seeking authority to pay its employees prepetition wages, salaries, or commissions and related benefits. Sometimes the motions are limited to the amount of these claims that constitute priority claims under Bankruptcy Code § 507, although the amounts sometimes substantially exceed those limits. Maintaining the good will of the workforce is critically important in the early days of a bankruptcy case and employees generally suffer severe financial hardship if they are not paid until distributions to creditors are made pursuant to a plan of reorganization. Therefore, secured creditors and administrative expense claimants with a higher priority claim generally do not object to the immediate payment of employees up to the priority limit. They may object to, and courts generally scrutinize more carefully, motions that seek to pay amounts in excess of the priority limit, particularly if substantial amounts are being paid to senior management. The 2005 Amendments increased the priority limit

for wages, salaries, or commissions, including vacation, severance, and sick-leave pay, from $4,925 to $10,000 per person (and also increased from 90 to 180 days the reach-back period in which these amounts may be earned). The Amendments also established a similar increase with respect to employee benefits. These changes should decrease, to some extent, controversial requests to pay prepetition wages, salaries, or commissions and related benefits.

A motion to pay prepetition wages, salaries, or commissions and related benefits is often handled on an expedited basis, even as a first day order, to avoid missing the regular payroll, which, because of the timing of the bankruptcy filing, includes prepetition amounts. Exhibit II-7 is a sample order authorizing employee payments.

Payment of Critical Vendors. Another motion the debtor may make early in the mega-case is one seeking permission to pay so-called "critical vendors" in respect of their prepetition claims. Debtors justify such motions on the theory that, if the requested prepetition payments are not made, these vendors will be unwilling to continue to ship needed goods to the debtor and the debtor will be denied the opportunity to reorganize. The Code provides no explicit authority to pay unsecured prepetition claims before a Chapter 11 plan is confirmed. Nevertheless, pre-Code decisions involving nineteenth century railroad reorganizations created the so-called "doctrine of necessity" that allowed payment of prepetition debts in order to ensure that supplies or services necessary to the survival of the debtor were provided. *See* Miltenberger v. Logansport, 106 U.S. 286 (1882); *In re* Lehigh & New England Railway Co., 657 F.2d 570, 581 (3d Cir. 1981). Because critical-vendor payments are claimed to be essential to avoid a debtor's liquidation, some courts have approved immediate payment of critical vendors under Bankruptcy Code § 105. *See, e.g., In re* Tropical Sportswear International Corp., 320 B.R. 15 (Bankr. M.D. Fla. 2005); *In re* Worldcom, Inc., 2002 WL 1732647 (Bankr. S.D.N.Y. 2002); *In re* Just for Feet, Inc., 242 B.R. 821 (D. Del. 1999).

However, payment of critical vendors is controversial, because it undermines the fundamental policy underlying the Bankruptcy Code of equal treatment of similarly situated creditors. Therefore, some courts have found such payments inappropriate under any circumstances, or have required that the debtor show that the vendors would cease dealing with the debtor in the absence of such payments and that the benefit to the estate is sufficiently great that the payments would not disadvantage other creditors not receiving the payments. *See, e.g.*, *In re* Kmart Corp., 359 F.3d 366 (7th Cir. 2004); *In re* CoServ, L.L.C., 273 B.R. 487 (Bankr. N.D. Tex. 2002); *In re* Timberhouse Post & Beam, Ltd., 196 B.R. 547 (Bankr. D. Mont. 1996).

The 2005 Amendments made certain changes to the Code that may make critical-vendor motions less frequent. Congress added section 503(b)(9), which gives all vendors an administrative expense claim for the value of any goods sold to the debtor in the ordinary course of the debtor's business and received by the debtor within 20 days before the date the case commences. In addition, the revisions to the right of

reclamation in section 546(c) and the more generous "ordinary course of business" defense to preference attack in revised section 547(c)(2) may protect many of those critical vendors who were the subject of first day motions. *See generally* Alan N. Resnick, *The Future of the Doctrine of Necessity and Critical-Vendor Payments in Chapter 11 Cases*, 47 B.C. L. Rev. 183 (2005).

In addition, the Advisory Committee on Bankruptcy Rules has proposed a new Rule 6003 that would preclude approval of a motion to pay prepetition claims within 20 days after the filing of the petition except as is "necessary to avoid immediate and irreparable harm." The new rule will become effective December 1, 2007, absent contrary congressional action. If critical-vendor motions are not only less necessary, but are also excluded from ex parte or limited notice resolution, much of the controversy about them may subside.

Insurance Proceeds. If a debtor is confronted with substantial liability claims that have precipitated the bankruptcy, the debtor's liability policy (and the payments that may be made thereunder) may be a major asset of the estate. The question may arise early in the case whether litigation involving the insurance proceeds will be centralized in the bankruptcy court or will proceed in other courts as long as no effort is made to reach the debtor or its other assets. A number of courts have used channeling injunctions and other procedures to address these issues. A full discussion of those matters is beyond the scope of this Guide.

To resolve this issue, the court must decide whether the liability policy or its projected proceeds constitute property of the estate under Bankruptcy Code § 541(a)(1). If the court decides that the proceeds of the policy are property of the estate, any act to obtain possession of those proceeds would be barred by the automatic stay. Although courts almost uniformly conclude that the language of section 541(a)(1) is broad enough to cover the debtor's interest in the liability insurance policy, *see, e.g.*, *In re* Vitek, Inc., 51 F.3d 530, 533 (5th Cir. 1995); MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 92 (2d Cir. 1988); Tringali v. Hathaway Machinery Co., 796 F.2d 553, 560–61 (1st Cir. 1986); A.H. Robins Co., Inc. v. Piccinin, 788 F.2d 994, 1001–02 (4th Cir. 1986); *In re* Minoco Group of Cos., Ltd., 799 F.2d 517, 519 (9th Cir. 1986), the courts are in disagreement over whether the proceeds of a liability insurance policy are property of the estate.

Some courts have found the debtor's interest in the liability policy necessarily extends to the proceeds of that policy, and therefore conclude that claimants are barred from pursuing any action to reach the insurance proceeds. *See* Tringali v. Hathaway Machinery Co., 796 F.2d 553, 560–61 (1st Cir. 1986). Others have looked at the identity of the beneficiary or beneficiaries of the liability policy. If payments by the insurer can be made only to third parties (and not to the debtor), these courts conclude that the proceeds do not constitute property of the estate and are therefore not protected by the automatic stay. *See In re* Edgeworth, 993 F.2d 51 (5th Cir. 1993) (holding that the proceeds of a physician's liability policy were not part of the physi-

cian's bankruptcy estate). Such an approach may be particularly relevant for directors' and officers' liability policies. *See, e.g.*, *In re* Louisiana World Exposition, Inc., 832 F.2d 1391 (5th Cir. 1987). A different approach may be necessary if the claims against the debtor exceed the expected liability insurance coverage, so that failure to enjoin actions to recover under the policy would result in a race to the courthouse to seek recovery from the policy. *See Vitek*, 51 F.3d at 535. Such a race could mean unfair results between similarly situated claimants and could also prevent a bankruptcy court from marshaling the insurance proceeds, along with other assets, so as to maximize overall distributions and preserve the estate. *But see* Landry v. Exxon Pipeline Co., 260 B.R. 769, 792–93 (Bankr. M.D. La. 2001).

Similar issues may arise with respect to workers' compensation claims. To the extent that such claims are to be paid by non-estate funds (e.g., a state insurance fund or surety bonds), property of the estate may not be at issue in any workers' compensation proceeding. Therefore, even if the proceeding is not excluded from the automatic stay by the regulatory proceeding exception of Bankruptcy Code § 362(b)(4), *see In re* Mansfield Tire & Rubber Co., 660 F.2d 1108, 1112–14 (6th Cir. 1981) (finding it excluded), it may not be covered by the automatic stay in the first instance. *See* EEOC v. Rath Packing Corp., 787 F.2d 318, 324 (8th Cir. 1986).

Seller's Right of Reclamation. Creditors who sell goods on credit to the debtor shortly before bankruptcy, if the debtor has received the goods while insolvent, are provided special rights under the Bankruptcy Code both with respect to reclamation of the goods if they are still in the hands of the debtor and with special priority for their value in certain circumstances.

Until 2005, section 546(c) of the Bankruptcy Code essentially recognized the state law of reclamation (Uniform Commercial Code Section 2-702(2)), with minor modifications. The 2005 Amendments modified section 546(c) to permit a seller who has sold goods to the debtor in the ordinary course of the seller's business to reclaim the goods, if the debtor received the goods while insolvent, within 45 days before the commencement of the case. To reclaim the goods, the seller must make a written demand within 45 days after debtor's receipt of the goods, or 20 days after commencement of the case, whichever period is longer. This section 546(c) right of reclamation is, however, "subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof." It is unclear whether this language gives the seller a right to excess proceeds of the goods after the secured creditor forecloses.

Under newly enacted section 503(b)(9), if the seller does not make a timely demand for reclamation, or for any other reason fails to obtain reclamation of the goods, the seller is still entitled to an administrative expense claim for the value of the goods if the goods were sold to the debtor in the ordinary course of the debtor's business and were received by the debtor within 20 days before commencement of the case.

A court confronted with a large number of reclamation claims may wish to consider consolidating them into a single proceeding and designating a lead counsel to argue any common questions of law.

Postpetition Utility Services. Bankruptcy Code § 366 bars a utility from altering, refusing to provide, or discontinuing service to, or discriminating against, a trustee or debtor solely on the basis of the commencement of a bankruptcy case. However, in a Chapter 11 case the utility is permitted to alter, refuse to provide, or discontinue service if the utility is not provided "adequate assurance of payment for utility service that is satisfactory to the utility" within 30 days of the filing of the petition.

Bankruptcy courts were previously divided over whether an administrative expense priority claim could be given to the utility in lieu of a deposit. The 2005 Amendments to section 366 explicitly provide that "administrative expense priority shall not constitute an assurance of payment." Instead, "assurance of payment" is defined to mean "(i) a cash deposit; (ii) a letter of credit; (iii) a certificate of deposit; (iv) a surety bond; (v) a prepayment of utility consumption; or (vi) another form of security that is mutually agreed on between the utility and the debtor or the trustee."

Prior to the 2005 Amendments, the bankruptcy court was often asked to decide the adequacy of both the form and amount of the assurance. Because the adequate assurance of payment must now be "satisfactory to the utility" in a Chapter 11 case, presumably the utility must be satisfied both with the form of the assurance of payment and with its amount. Therefore, the debtor must undertake individual negotiations with its utility providers at its various locations to provide adequate assurance of payment, rather than securing a single section 366 order establishing the form and amount (or methodology for determining the amount) of such assurance. The debtor may file a motion pursuant to section 366(c)(3) early in the case presenting its offer of adequate assurance (for example, a cash deposit equal to one month's average usage) and asking the court to determine that it constitutes adequate assurance in the absence of an objection by the utility. The court may wish to set a single court date for the entry of any section 366 orders within 30 days after the petition is filed.

Pension Plan Withdrawal Liability. Under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001–1461, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208 (1980), a complete withdrawal from a multiemployer plan is deemed to occur when a participating employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan. 29 U.S.C. § 1383. A 70% contribution decline or a partial cessation of contribution obligations results in a partial withdrawal. 29 U.S.C. § 1385. When there is a complete or partial withdrawal, the employer may incur significant withdrawal liability for an allocable amount of unfunded vested benefits, as adjusted. 29 U.S.C. § 1391. The statute provides that any disputes between an employer and the

plan sponsor of a multiemployer plan concerning determinations of withdrawal liability under the Act shall be resolved through arbitration. 29 U.S.C. § 1401(a)(1).

When the employer is in bankruptcy, those bankruptcy courts that have confronted the issue have concluded that, under ERISA, the bankruptcy court has the authority to determine the amount of the claim of the plan sponsor for withdrawal liability without referring the matter for arbitration. *See In re* Interco Inc., 137 B.R. 993, 995–96 (Bankr. E.D. Mo. 1992); *In re* T.D.M.A., Inc., 66 B.R. 992, 997 (Bankr. E.D. Pa. 1986); *In re* Amalgamated Foods, Inc., 41 B.R. 616, 617–18 (Bankr. C.D. Cal. 1984). These courts have noted that no special expertise is necessary to determine withdrawal liability, and the court should determine the validity and amount of such a claim as part of the normal claims-resolution process.

Appointment of Trustee or Examiner. Under Bankruptcy Code § 1104(a), at any time after the commencement of a case, any party in interest or the U.S. trustee may request appointment of a trustee "for cause, including fraud, dishonesty, incompetence, or gross mismanagement . . . either before or after commencement of the case," or if the appointment would be "in the interests of creditors, any equity security holders, and other interests of the estate," or if grounds exist for conversion or dismissal of the case under section 1112, but the court determines that the appointment of a case trustee is "in the best interests of creditors and the estate." Under the 2005 Amendments, the grounds in section 1112 for converting or dismissing a case (and, therefore, the grounds for appointing a trustee under section 1104) have been substantially expanded. In addition, under the 2005 Amendments, the U.S. trustee is directed to move for the appointment of a trustee if there are reasonable grounds to suspect that certain members of the debtor's management or Board of Directors "participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor's public financial reporting." Bankruptcy Code § 1104(e).

When the relationship between creditors and management has been troubled, a motion for the appointment of a trustee may be made early in a case. Bankruptcy courts also have the authority to appoint a trustee sua sponte. *See In re* Bibo, Inc., 76 F.3d 256, 258 (9th Cir. 1995). Although appointing a trustee in a Chapter 11 case is an extraordinary remedy, and there is a "strong presumption" that the debtor should be permitted to remain in possession, *see In re* Marvel Entertainment Group, Inc., 140 F.3d 463, 471 (3d Cir. 1998), such motions must be granted when the required showing is made by "clear and convincing" evidence. *Marvel*, 140 F.3d at 471. Cases in which courts have appointed trustees tend to involve conflicts of interest or self-dealing; misuse of debtor assets; inadequate record keeping and reporting; failure to file required documents or misrepresentations in those documents; financial mismanagement; failure to pay or withhold taxes or failure to file returns; fraud or dishonesty; failure to comply with court orders; and lack of credibility and creditor confidence.

In considering whether to appoint a trustee, the court must also weigh the benefits of the appointment against the costs associated with such an action, including the compensation that will be paid to the trustee and the cost implicit in replacing current management with a team that is less familiar with the debtor and its operations. *See* Schuster v. Dragone, 266 B.R. 268, 271 (D. Conn. 2001); *In re* SunCruz Casinos, LLC, 298 B.R. 821, 829 (Bankr. S.D. Fla. 2003).

A less dramatic step to the appointment of a trustee is the appointment of an examiner. Under Bankruptcy Code § 1104(c), a party in interest or the U.S. trustee may request the appointment of an examiner "to conduct such an investigation of the debtor as is appropriate." The court is directed to appoint an examiner if the appointment "is in the interests of creditors, any equity security holders and other interests of the estate," or if "the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000." Most courts conclude that appointment of an examiner is mandatory if the $5 million threshold is met. *See In re* Revco D.S., Inc., 898 F.2d 498 (6th Cir. 1990); *In re* Loral Space & Communications, Ltd., 2004 WL 2979785 (S.D.N.Y. 2004); *In re* UAL Corp., 307 B.R. 80, 84 (Bankr. N.D. Ill. 2004).

Appointment of an examiner may be beneficial to the case for many reasons. For example, an investigation by the examiner may cost significantly less, and be conducted in less time, than would individual investigations of the debtor by multiple parties, particularly those who are involved in other aspects of the case. The examiner may also be able to serve as an unbiased third party, resolving disputes between the parties and helping to facilitate management or reorganization issues that might otherwise become more contentious. *See generally* Barry L. Zaretsky, *Symposium on Bankruptcy: Chapter 11 Issues: Trustees and Examiners in Chapter 11*, 4 S.C. L. Rev. 907, 910 (Summer 1993).

An examiner's duties include investigation of the debtor and the debtor's business and "any other matter relevant to the case or to the formation of a plan," as well as "other duties of the trustee that the court orders the debtor in possession not to perform." Bankruptcy Code § 1106(b). The bankruptcy court retains broad discretion to direct the examiner's investigation by defining its nature, extent, and duration. Exhibit II-8 provides a sample order for appointing an examiner. Among other tasks, examiners have been given the duty to mediate plan negotiations, assist with the resolution of disputed claims, prosecute claims on behalf of the debtor, review fee applications of professional persons, or provide advice to the court with respect to specialized areas of the law. The scope of the examiner's role is determined by the facts and circumstances of the particular case. In defining the duties to be performed by an examiner, the court should consider whether those duties are already being performed by professionals for the debtor or the committees and whether the cost of certain tasks outweighs the benefits to be derived.

Assumption or Rejection of Executory Contracts or Leases. Under Bankruptcy Code § 365, a trustee or debtor-in-possession is given the option to assume or reject any executory contract or unexpired lease, subject to court approval. For executory contracts and unexpired leases of residential real property, the trustee in a Chapter 11 case is given until confirmation of a plan to make its decision. Bankruptcy Code § 365(d)(2). For unexpired leases of nonresidential real property under which the debtor is the lessee, the lease is deemed rejected if the trustee does not act before the earlier of 120 days after the date of the order for relief or the date of confirmation of a plan. Bankruptcy Code § 365(d)(4). The court may extend the 120-day period for cause for 90 days on motion of the debtor or lessor, but further extensions require the prior written consent of the lessor. *Id.*

Proposed Bankruptcy Rule 6003, which will become effective December 1, 2007, absent contrary congressional action, would prohibit the court from granting motions to assume or assign executory contracts and unexpired leases for the first 20 days of the case, unless granting relief is necessary to avoid immediate and irreparable harm. The purpose of this proposed rule is to alleviate some of the time pressure at the start of a case so that full and close consideration can be given to matters that may have a fundamental impact on the case.

The debtor in a mega-case may be party to a great number of executory contracts and unexpired leases. As a result, the debtor may file a motion seeking to assume or reject multiple contracts or leases at the same time. The concern with such omnibus motions is that individual parties to contracts or leases listed in such a motion may fail to receive effective notice of the motion when their names are included in a long list of parties against whom relief is sought.

A bankruptcy court may wish to consider allowing omnibus motions to assume or reject executory contracts or unexpired leases between the debtor and more than one nondebtor party or group of affiliated nondebtor parties only if affirmative steps are taken to ensure that all such parties have adequate notice. The court might require the movant to take some or all of the following steps:

- state in a conspicuous place that parties receiving the motion should locate their names in the list of parties against whom relief is sought;
- list all parties against whom relief is sought by any such motion alphabetically in a single location;
- number consecutively all individual motions included in any omnibus motion; and
- limit the number of executory contracts and unexpired leases in any such omnibus motion to a reasonable number.

The court may wish to preclude the debtor from including multiple executory contracts or unexpired leases in a single motion to assume or assign unless they are

all between the debtor and a single nondebtor party or between the debtor and a group of affiliated nondebtor parties.

Proposed amendments to Bankruptcy Rule 6006 would explicitly authorize omnibus motions to reject up to 100 executory contracts and unexpired leases and would also authorize omnibus motions to assume or assign up to 100 executory contracts or leases under specific circumstances. To ensure that nondebtor parties to the contracts and leases receive effective notice, the amendments also set forth procedural requirements similar to, although more extensive than, those described above.

When the court approves a motion seeking assumption or assumption and assignment of an executory contract or lease, the order should include appropriate provisions addressing the cure of any defaults under the contract or lease. If the court approves rejection of an executory contract or lease, the deadline and procedure for filing proofs of claim for rejection damages should be established at the same time.

Retention and Payment of Professionals

Retention of Professionals. In a mega-case, both the debtor and any official committee will seek to employ attorneys, accountants, financial advisers, and other professionals to assist them pursuant to Bankruptcy Code §§ 327 and 1103. Such professionals may not be awarded compensation for their services if at any time during their employment they are not "disinterested persons" or if they represent or hold "an interest adverse to the interest of the estate" with respect to the matter of the employment. Bankruptcy Code § 328(c). Special counsel who have represented the debtor may be retained by the trustee under Bankruptcy Code § 327(e) with the court's approval if such retention is "in the best interest of the estate" and the attorney does not "represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which the attorney is to be employed."

The party seeking approval of the retention of a professional person must file with the bankruptcy court an application stating the facts requiring the retention as set forth in Bankruptcy Rule 2014(a), accompanied by a verified statement or affidavit of the professional person setting forth any connections with the parties in interest and a proposed order approving the motion. Promptly after learning of any additional material information relating to the proposed retention (such as potential or actual conflicts of interest), the professional should file a supplemental verified statement or affidavit setting forth such additional information. Any such application should highlight the statutory basis for the retention. It should also disclose whether the professional person is holding a retainer from the debtor. If the professional is holding a retainer, the proposed order should specifically address the circumstances under which the retainer may be retained and/or applied to the professional's fees and expenses. Any attorney representing the debtor must file the statement, required by Bankruptcy Code § 329 and Rule 2016(b), with the application. In addition, some

courts require that the debtor's professionals provide information regarding payments received by them within 90 days before the bankruptcy filing, because being a preference defendant themselves would create an actual conflict. *See, e.g., In re* Florence Tanners, Inc., 209 B.R. 439, 448 (Bankr. E.D. Mich. 1997), *aff'd in part*, Halbert v. Yousif, 225 B.R. 336, 347 (E.D. Mich. 1998); *In re* American Thrift & Loan Ass'n, 137 B.R. 381, 387–88 (Bankr. S.D. Cal. 1992).

Some courts require that an application include a specific recitation of the anticipated services to be rendered by the professional, together with an estimate of the cost associated with each such service. Courts may also require that the order include the proposed terms and method of calculating compensation. For professionals other than general counsel for the debtor and for the official committees, the court may consider imposing a reasonable fee cap based on the estimate contained in the application, subject to adjustment by motion. Some courts also ask the professionals to provide a "budget" and the court then monitors the performance of the professional against the budget at subsequent fee hearings.

All parties in interest should be afforded an opportunity to object to an application for retention, and, if objections are filed, the motion should be subject to a hearing. Indeed, to ensure the matter is given full and close consideration, proposed Bankruptcy Rule 6003, which will become effective December 1, 2007, absent contrary congressional action, would prohibit the court from granting relief on applications for the employment of professional persons for the first 20 days of the case. However, if a motion is granted, the retention should generally be made effective as of the date the motion was filed, unless the court orders otherwise.

The bankruptcy court should be wary of proposed orders that contain inappropriate or misleading provisions. There has been substantial debate over provisions providing for indemnification of professionals; some professionals seek court approval for the debtor to indemnify them for their own negligence. *See* United Artists Theatre Co. v. Walton, 315 F.3d 217 (3d Cir. 2003). Some engagement letters provide for arbitration of any fee dispute. Other engagement letters have sought to limit any recovery the estate may have against such professionals to the amount of fees earned by them in the engagement. Such provisions are most common in engagement letters of investment bankers and may be found objectionable.

Courts differ over whether the general requirements of Bankruptcy Code § 327 should apply to the debtor's "ordinary course" professionals, i.e., those professionals who, prior to the debtor's bankruptcy, have been working for the debtor handling routine legal work (such as real estate matters or tax issues). Some courts, citing their authority under Bankruptcy Code § 105, allow these professionals to be paid in the ordinary course of business as long as their fees do not exceed a specified monthly amount and they file a statement of disinterestedness. This procedure permits the debtor's operations to continue undisturbed without requiring perhaps dozens of retention applications and an equal number of applications for compensation that must

be approved by the court. Other courts demand that all professionals, including those providing ordinary course services, comply with the requirements of the Code and the Rules governing retention, noting that the ordinary course exception removes the court's control over the retention process, allowing the debtor to retain professionals without the court knowing that a professional has been employed or what that professional has been hired to do.

Payment of Interim Fees. Bankruptcy Code § 331 allows a professional person employed under Bankruptcy Code § 327 or 1103 to apply to the court "not more than once every 120 days" (or more often if the court permits) for interim compensation. Most courts allow more frequent awards and simplified procedures in a mega-case where professional persons are spending large amounts of time on the case and delay in receipt of compensation may create a significant financial hardship.

Some bankruptcy courts, after notice and a hearing, approve a streamlined procedure for periodical payment of fees and costs prior to actual allowance by the court. For example, the court may permit a professional person to receive the fees and expenses requested, perhaps with a "hold back" of a portion of the fees, by submitting a request supported by contemporaneous billing records. Such a request is filed with the bankruptcy clerk and served on the Short List, and in the absence of an objection (which does not prejudice the right of any party to object to the court's ultimate allowance of the fees and costs), the interim payment is made. If there is an objection, that portion of the requested fees and costs to which an objection is made is not disbursed. When the court has a hearing to allow fees and expenses (perhaps every 120 days), the fees and any expenses held back from the monthly disbursement may be distributed if allowed. If the court does not ultimately approve the fees and expenses previously paid to a professional, the recipient must disgorge the funds so received. A sample administrative order establishing procedures for interim compensation of professionals on a monthly basis is attached as Exhibit II-9.

Although such an approach has been used in many cases and has been expressly upheld when challenged by several courts, *see, e.g.*, *In re* ACT Manufacturing, Inc., 281 B.R. 468 (Bankr. D. Mass. 2002); *In re* Mariner Post-Acute Network, Inc., 257 B.R. 723 (Bankr. D. Del. 2000); *In re* Pittsburgh Corning Corp., 255 B.R. 162 (Bankr. W.D. Pa. 2000); *In re* Knudsen, 84 B.R. 668 (9th Cir. BAP 1988), some courts have rejected this procedure, stating that there is no statutory basis for allowing the payment of fees and expenses prior to allowance. *See, e.g.*, *In re* Commercial Financial Services, Inc., 231 B.R. 351 (Bankr. N.D. Okla. 1999); *In re* Gemlime Group, L.P., 167 B.R. 453 (Bankr. N.D. Ohio 1994). These courts are willing to allow fees more frequently than once every 120 days, but only with approval by the court upon application and after notice and a hearing under Bankruptcy Code § 331.

When the court is considering the appropriate procedures for awarding interim fees, the court should be sensitive to the financial position of the debtor. If the debtor has operational needs for cash that would be impaired by frequent payments of pro-

fessionals, such payments may not be warranted. Alternatively, the debtor may prefer for cash-management purposes to pay professionals monthly rather than face a huge bill every 120 days. This allows the debtor to keep a tighter rein on activities by the professionals. If the debtor is likely to be administratively insolvent, the court may not wish to award professional persons more than they would be likely to receive at the end of the case. The court may also wish to ensure that fees are held back in an amount sufficient to allow adjustments when the final fee award is made.

Evaluation and Allowance of Fees. Prior to 1994, Bankruptcy Code § 330(a) directed courts to consider "the nature, the extent, and the value" of the services performed by a professional person in making an award of "reasonable compensation," as well as the "time spent on such services, and the cost of comparable services" in nonbankruptcy situations. In 1994, and again in 2005, Bankruptcy Code § 330(a) was amended to provide more statutory guidance on the appropriate factors to be considered in awarding compensation. These factors include

- the time spent on such services;
- the rates charged for such services;
- whether the services were necessary or beneficial to the bankruptcy case;
- whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task;
- whether a professional person seeking compensation is board certified or has otherwise demonstrated skill and experience in the bankruptcy field; and
- whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than bankruptcy cases.

Congress also explicitly directed that compensation should be disallowed for unnecessary duplication of services, or services that were not reasonably likely to benefit the debtor's estate or were not necessary to the administration of the case. Bankruptcy Code § 330(a)(4)(A).

Any person seeking compensation for services, or reimbursement of expenses, is directed by Bankruptcy Rule 2016(a) to file an application "setting forth a detailed statement of (1) the services rendered, time expended, and expenses incurred, and (2) the amounts requested." Some districts have adopted local rules or general orders providing specific guidelines on such applications, on the types of services that will be compensable, and on how various expenses will be treated. Among other things, the court may specify a uniform format for fee applications, including perhaps the requirement of a cover sheet that clearly summarizes the fees requested and the total fees already allowed to that professional. Examples of a local form for fee applications and a general order concerning guidelines for compensation and expense reim-

bursement are attached as Exhibits II-10 and II-11. If the applicable jurisdiction has no general order or local rule, the bankruptcy judge may wish to consider establishing fee application procedures and guidelines for the particular mega-case. An example of such an order is attached as Exhibit II-12.

One issue that has divided courts in mega-cases is whether professionals who are based in a jurisdiction other than that in which the court sits should be allowed fees based on their normal billing rates, or whether the professionals should be bound by those rates charged by professionals in the local jurisdiction, *see, e.g.*, *In re* Seneca, 65 B.R. 902, 911 (Bankr. N.D. Okla. 1986); *In re* Shaffer-Gordon Associates, Inc., 68 B.R. 344 (Bankr. E.D. Pa. 1986); *In re* Geofreeze Corp., 50 B.R. 200, 202 (Bankr. E.D. Va. 1985); *In re* Global International Airways Corp., 38 B.R. 440 (Bankr. W.D. Mo. 1984). As bankruptcy practice becomes more national in scope, bankruptcy courts may be more willing to allow an award of compensation at the rate generally charged by a retained professional without regard to what those providing similar services in the local market charge. Bankruptcy judges who have handled mega-cases have recognized the value brought to the case by national professionals experienced in complex cases and have recognized that such professionals should be compensated accordingly.

Sometimes financial advisers (which tend to be investment banking firms) request compensation on a basis different from that charged by attorneys (who generally bill on a lodestar basis of rate multiplied by hours spent). Investment bankers typically do not maintain time records, but bill on the basis of a flat fee for a project or a flat monthly fee for the duration of their services, sometimes coupled with a "success" fee. As a result, some bankruptcy courts have allowed financial advisers to be paid according to their usual engagement agreements instead of requiring adherence to the billing practices of attorneys.

Applying the required statutory factors of Bankruptcy Code § 330(a) to the many fee applications filed in a mega-case may be a burdensome task, one with which the court may need assistance. The court may be overwhelmed by fee applications if a procedure for reviewing them is not established as soon as possible. Only the bankruptcy judge may make the ultimate decision to award or deny fees, but effective review of the fee request requires that interested parties have an opportunity to inform the court whether the fee application justifies the compensation requested.

Because professional compensation is paid by the bankruptcy estate, in theory all creditors have an incentive to object to fees that are not justified. However, in practice objections to fee applications are not common. First, no single client has the same interest in controlling fees in bankruptcy (where fees come out of the estate) as it would were the client paying those fees. The clients (both debtor and creditors' committee) also are less likely to challenge the fees sought by their own professionals than they would outside bankruptcy, because they are so dependent on the assistance they are receiving and will be receiving during the case. Finally, there is also a

perception that no professional wishes to challenge another professional's fee application lest his or her own application be subject to similar scrutiny by the disgruntled target of the original objection.

Courts have, therefore, recognized that an independent third party may be necessary to scrutinize all fee applications to determine whether the compensation sought is justified. Among the entities on whom courts have relied are the following:

- **U.S. trustee**—In some districts, the U.S. trustee takes an active role in reviewing fee applications. The Executive Office of the United States Trustee (EOUST) has adopted *Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330* and is developing software to identify duplicate entries in time sheets submitted with fee applications and provides other technical assistance in reviewing applications. The U.S. trustee can ensure that the description of the work performed is accurate, that expenses are documented, that the hourly rates are consistent with work in other cases, and that the time spent on particular tasks is not excessive. The U.S. trustee can also provide recommendations to the judge on whether the professional is spending the appropriate amount of time on tasks.
- **Fee examiner**—Some courts have appointed their own experts or auditors to review fee applications and make recommendations to the court. While some courts have found such experts helpful, others have found that they add little to the scope of review provided by the U.S. trustee. Moreover, there is a perception that fee examiners may add additional fees to a case that exceed the benefit obtained and that a fee examiner may feel compelled to find something deficient in the fee applications subject to review in order to justify his or her appointment.
- **Budget (or fee audit) committee**—One approach that has met with some success is the appointment of a committee to contain costs during the bankruptcy case. The committee is usually composed of business people (representatives of the debtor, a U.S. trustee representative, and representatives from the creditors' committee) and is allowed to provide guidance to the professionals in the case as to whether certain activities are appropriate before they are pursued. The committee also reviews the fee petitions not only for the types of objections that may typically be made by the U.S. trustee (e.g., unsubstantiated expenses, excessive time on a particular task, or too many people at a meeting), but also for time spent on tasks not likely to create value for the client. If the committee has an independent third-party member, that third party will also be compensated from the estate.

  When an independent third party serves as a filter for fee applications, the submissions to the court tend to be stripped of clearly objectionable material, making review by the court more efficient. To facilitate efficient review of

fee petitions by any independent third party, the court can require that task codes, uniform for every professional, be used so that the third party can ascertain how much time is spent on each task by each professional. The court also can ask that budgets be established, by task, and it can review monthly costs against the budget, in order to control fees. By implementing effective mechanisms for controlling costs in a mega-case, and for reviewing fee applications, the court can combat the pervasive public perception that bankruptcy fees are too high and taint the legitimacy of the bankruptcy process.

III. Handling Litigation

Maintaining Control of the Litigation Process

Every adversary proceeding and contested matter in a bankruptcy case potentially presents the opportunity for major conflict. In a mega-case, with large amounts of money at stake, large amounts of money available to fund litigation, and a multiplicity of interested parties and issues, the risk of litigation spinning out of control magnifies. The bankruptcy judge must maintain control over the litigation process to ensure that each matter is resolved efficiently at the lowest cost possible. This section highlights some of the case-management issues the bankruptcy court might encounter in connection with litigation during the mega-case. Other publications describe other case-management issues and techniques that also may be relevant, but they will not be repeated here, *see, e.g.*, Case Management Manual for United States Bankruptcy Judges (Federal Judicial Center and Administrative Office of the U.S. Courts 1995); Manual for Complex Litigation, Fourth (Federal Judicial Center 2004); S. Elizabeth Gibson, Judicial Management of Mass Tort Bankruptcy Cases (Federal Judicial Center 2005).

Pretrial Management Techniques. Bankruptcy Rule 7016, which incorporates Federal Rule of Civil Procedure 16, authorizes the judge in adversary proceedings to conduct a pretrial conference or conferences to expedite the disposition of the action, establish control to avoid unnecessary protraction of the case, and facilitate settlement, among other goals. The court is required in most cases to enter a scheduling order with respect to the adversary proceeding limiting the time to join other parties, to amend the pleadings, to file motions, and to complete discovery. "[A]ny other matters appropriate in the circumstances of the case" may also be included in the order. An example of a pretrial scheduling order is attached as Exhibit III-1. Bankruptcy Code § 105(d)(1) also requires the court to hold "such status conferences as are necessary to further the expeditious and economical resolution of the case."

Although Bankruptcy Rule 7016 is not automatically applicable to "contested matters," the court has the authority pursuant to Bankruptcy Rule 9014(c) at any stage in a particular contested matter to direct that it applies. Thus, if a judge found that conducting a pretrial or settlement conference or issuing a scheduling order would facilitate the resolution of a contested matter in a mega-case, the judge could direct that Rule 7016 be applied.

The court also needs to exercise control over pretrial discovery. Federal Rule of Civil Procedure 26(b)(2)(C), made applicable to adversary proceedings by Bankruptcy Rule 7026 and to contested matters by Bankruptcy Rule 9014(c), allows the court, by order (either on its own initiative or upon motion), to limit the "frequency or extent of use of the discovery methods otherwise permitted," such as the number of depositions and interrogatories or the length of depositions. Such limitations may

be appropriate when the court determines that "(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit." A sample order limiting discovery is attached as Exhibit III-2.

Under Federal Rule of Civil Procedure 26(d), also applicable to adversary proceedings in bankruptcy cases under Bankruptcy Rule 7026, in most circumstances a party may not seek discovery from any source before the parties have engaged in a conference as described in Federal Rule of Civil Procedure 26(f) (not applicable to contested matters under Bankruptcy Rule 9014(c) unless the court directs otherwise). Such a conference must precede oral depositions (Rule 30(a)(2)(C)), depositions upon written questions (Rule 31(a)(2)(C)), service of interrogatories (Rule 33(a)), requests for production of documents (Rule 34(b)), and requests for admission (Rule 36(a)), unless the court orders otherwise or the parties stipulate to the contrary.

The conference must be held as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due. The purpose of such a conference is "to consider the nature and basis of their claim and defenses and the possibility for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), and to develop a proposed discovery plan." Form 35, Federal Rules of Civil Procedure, provides guidance on the form of a discovery plan. The plan is to be submitted to the court within 14 days after the conference, Federal Rule of Civil Procedure 26(f), and serves as the basis for the court's scheduling order under Federal Rule of Civil Procedure 16. The attorneys of record and all unrepresented parties are jointly responsible for arranging the conference, attempting in good faith to agree on a proposed discovery plan, and submitting the plan to the court. If any party or attorney fails to participate in good faith in the development and submission of a proposed discovery plan, the court may award reasonable expenses caused by the failure to the other party or parties, including attorneys' fees. Federal Rule of Civil Procedure 37(g).

Litigation in large Chapter 11 cases will increasingly involve the exchange of electronically stored information, such as e-mails, webpages, word-processing files, and databases. This information is stored in the memory of computers, on magnetic disks (such as computer hard drives and floppy disks), on optical disks (such as DVDs and CDs), and on flash memory devices (such as thumb or flash drives). Amendments to the Federal Rules of Civil Procedure that specifically address the discovery of electronically stored information and related management considerations are discussed in Barbara J. Rothstein, Ronald J. Hedges, and Elizabeth C. Wiggins, *Managing Discovery of Electronic Information: A Pocket Guide for Judges* (Federal Judicial Center 2007).

Because full-blown litigation is costly, and the cost is borne by the bankruptcy estate (at least in part), settlement prior to trial may be the optimal resolution of some disputes, particularly in a mega-case. Some courts have found that the prospect of the court estimating disputed claims may encourage settlement, because the parties would rather determine the amount of claims than leave that issue to the bankruptcy judge. Although the bankruptcy judge may or may not choose to become involved personally in settlement discussions, when the court facilitates and encourages settlement discussions the parties tend to be more willing to pursue them. At the initial pretrial conference, for example, the judge may speak to the parties about the possibility of settlement and set up a schedule of meetings to be briefed on progress. In those districts with multiple bankruptcy judges, some judges who wish to avoid personal involvement in settlement negotiations (because the judge may have to resolve the dispute if it is not settled) have found it useful to request that a colleague on the court take a more active role as a settlement facilitator.

The Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–658, directed each district court to "authorize, by local rule . . . , the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy." 28 U.S.C. § 651(b). Many bankruptcy courts have adopted their own local rules or general orders permitting the court to refer a dispute to mediation or, generally upon consent of the parties pursuant to Bankruptcy Rule 9019(c), to arbitration. Federal Rule of Civil Procedure 16(c), made applicable to adversary proceedings under Bankruptcy Rule 7016, encourages the court to consider and take appropriate action at any pretrial conference "with respect to . . . settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule." The 1993 Advisory Committee Notes to Rule 16(c) suggest that this language refers to "possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits."

Bankruptcy courts have referred a broad range of issues to mediation or arbitration, from routine adversary proceedings and contested matters to more complex disputes. An independent mediator may also assist in formulation of a plan of reorganization. Some courts, however, have explicitly excluded from eligibility for alternative dispute resolution the compensation of professionals and matters involving contempt or sanctions.

More information about the use of alternative dispute resolution in bankruptcy cases can be found in Robert J. Niemic, Donna Stienstra & Randall E. Ravitz, *Guide to Judicial Management of Cases in ADR* (Federal Judicial Center 2001).

Streamlining Trials. The nature of a mega-case, with its many parties (often geographically dispersed) and large amounts at stake, tends to magnify the challenges of managing the trial process. If there are multiple adversary proceedings pending that involve common questions of law or fact (such as multiple preference

actions in which the issue of the debtor's solvency or whether payments were made "in the ordinary course of business" of the debtor may be presented), the court may consider ordering all the actions consolidated or may order a joint hearing or trial of any or all of the common matters under Federal Rule of Civil Procedure 42(a), made applicable to adversary proceedings under Bankruptcy Rule 7042. Even when those proceedings are pending in different courts, perhaps because of the changes to the venue provisions of 28 U.S.C. § 1409(b) made by the 2005 Amendments, the court may wish to coordinate proceedings pending in the different districts to minimize duplication of efforts. Suggestions for coordination between courts can be found in the *Manual for Complex Litigation, Fourth,* § 20.14 (Federal Judicial Center 2004).

One of the most potentially time-consuming aspects of trial of an adversary proceeding or contested matter in a mega-case is the direct and cross-examination of witnesses by all interested parties. The bankruptcy court is directed by Federal Rule of Evidence 611(a), made applicable in bankruptcy cases by Bankruptcy Rule 9017, to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Among the approaches some courts have found useful is requiring various groups of interested parties to select a lead counsel to conduct the examination on their behalf. Other courts have imposed strict limits on the length of trials or the examination or cross-examination of witnesses.

Another technique is to require by pretrial order that direct testimony be provided by declaration, submitted prior to trial under penalty of perjury, rather than by oral testimony in open court. Other parties may raise any evidentiary challenges prior to trial, and the witness must be available for cross-examination in person during the trial. The party presenting the witness may question the witness following cross-examination to present redirect testimony only. Such a mechanism has withstood several challenges that it fails to comply with Federal Rule of Civil Procedure 43(a) (made applicable to bankruptcy cases by Bankruptcy Rule 9017), which requires that "the testimony of witnesses shall be taken in open court" absent a federal law or rule to the contrary. *See, e.g.*, *In re* Gergely, 110 F.3d 1448, 1452 (9th Cir. 1997); *In re* Adair, 965 F.2d 777, 779 (9th Cir. 1992); *In re* Stevinson, 194 B.R. 509, 511 (D. Colo. 1996); *In re* Geller, 170 B.R. 183, 185 (Bankr. S.D. Fla. 1994). An example of an order requiring presentation of testimony by declarations is attached as Exhibit III-3. Courts may also allow the admission of deposition testimony at trial under similar circumstances. *See, e.g.*, Haseotes v. Cumberland Farms, Inc., 216 B.R. 690, 694 (D. Mass. 1997). Although some courts have approved that procedure, it is subject to some debate.

Because contested matters are initiated by motion pursuant to Bankruptcy Rule 9014(a), and Federal Rule of Civil Procedure 43(e) (made applicable under Bank-

ruptcy Rule 9017) permits the court to hear a motion "on affidavits presented by the respective parties" or "wholly or partly on oral testimony or depositions," testimony by declaration in a contested matter is clearly permissible. Bankruptcy Rule 9014(d) states that testimony of witnesses with respect to "disputed material factual issues" in contested matters is to be taken in the same manner as testimony in an adversary proceeding.

Federal Rule of Civil Procedure 43(a) provides the court an additional tool for streamlining trials: "For good cause shown in compelling circumstances and upon appropriate safeguards" the court may permit presentation of testimony in open court by "contemporaneous transmission from a different location." Although remote transmission of testimony is not to be used merely for the convenience of witnesses, it does permit the court to continue with the trial (rather than reschedule) in those rare circumstances when a witness is unable to attend trial but is able to testify from a different location. As noted above, many courts are now using videoconferencing to allow witnesses and counsel to appear and testify from remote locations. For more information, see *Roundtable on the Use of Technology to Facilitate Appearances in Bankruptcy Proceedings* (Federal Judicial Center 2006).

Resolving Claims

A mega-case frequently involves a large number of claims. Although many of these claims may not be subject to objection, others may be disputed by the debtor or other parties in interest. The court should consider implementing a claims-resolution process that will deal with such challenges in an efficient manner that minimizes the need for judicial involvement.

Identification of Claims. The claims-resolution process relies primarily on the claimants to identify themselves by filing their claims pursuant to Bankruptcy Code § 501(a) within the time fixed by the court under Bankruptcy Rule 3003(c)(3). Their ability to do so depends in large measure on their receipt of notice sufficient to alert them to the necessity of filing a proof of claim by the bar date. Because most potential claimants who receive notice of the bar date are not well versed in bankruptcy law, the bankruptcy judge may wish to require that the notice be written in plain language that is comprehensible to the recipients. If more claimants are able to understand the notice they receive, the court will be less likely to confront large numbers of motions seeking permission to file claims after the bar date.

In some mega-cases, such as a mass tort mega-case, the identity of many of the potential claimants may be unknown to the debtor. As a result, the debtor may be unable to send individualized notices to the potential claimants to alert them of the need to file a claim. The Supreme Court has recognized that notice is "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

However, individualized notice is not necessarily required. Instead, the Constitution requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. For known claimants, individualized notice is necessary, but for claimants "whose interests or whereabouts could not with due diligence be ascertained," the Supreme Court has approved notice by publication as constitutionally sufficient. *Id*.

Even when notice by publication is appropriate in a mega-case, designing the appropriate publication plan is complicated. The court may wish to consider encouraging the debtor to retain a media/noticing consultant who can assist in designing an appropriate notice plan that will satisfy due process concerns. In addition to identifying the target audience for the notice, such a professional will also analyze "frequency and reach," that is, what publications or other types of media are likely to be read or seen or heard by the target audience, and how often and over what period the notice must be disseminated to maximize the likelihood that the target audience will receive it. The role of the court is not to formulate the plan for giving notice, but to rule on whether the plan proposed by the debtor satisfies the requirements of due process.

Even if notice by publication satisfies due process concerns with respect to unknown, present claimants, whether constitutionally sufficient notice can ever be provided to future claimants remains an unresolved issue. For a further discussion of the due process rights of unknown present and future claimants in mass tort bankruptcy cases, see S. Elizabeth Gibson, *Judicial Management of Mass Tort Bankruptcy Cases* (Federal Judicial Center 2005).

Class Claims. One objection that may be raised is to a proof of claim filed by a representative on behalf of a class of similar claims. Although most courts have concluded that these "class proofs of claim" are permissible, at least when the class was certified prepetition, the courts are not uniform. *Compare In re* Birting Fisheries, Inc., 92 F.3d 939 (9th Cir. 1996); *In re* Charter Co., 876 F.2d 866 (11th Cir. 1989); Reid v. White Motor Corp., 886 F.2d 1162 (6th Cir. 1989); *In re* American Reserve Corp., 840 F.2d 487 (7th Cir. 1988); *In re* Trebol Motors Distributor Corp., 220 B.R. 500 (1st Cir. BAP 1998) (allowing class proof of claim) *with In re* Standard Metals Corp., 817 F.2d 625 (10th Cir. 1987), *aff'd in part and rev'd in part on other grounds sub nom.* Sheftelman v. Standard Metals Corp., 839 F.2d 1383 (10th Cir. 1987) (holding class proofs of claim impermissible). *Cf. In re* Craft, 321 B.R. 189 (Bankr. N.D. Tex. 2005) (allowing class proof of claim for a class certified prepetition, but disallowing class proof of claim for a class not certified prepetition).

If the court permits a class proof of claim, the court may have to decide whether the class representative may vote on behalf of the class. Some courts have permitted such a vote, but only on behalf of those members of the class who do not cast indi-

vidual votes. *See In re* American Family Enterprises, 256 B.R. 377, 404 n.20 (D.N.J. 2000); *In re* Mortgage & Realty Trust, 125 B.R. 575, 583 (Bankr. C.D. Cal. 1991).

Because the issue of the appropriate treatment of a class of claims can have a serious impact on plan negotiations, the court should generally attempt to resolve it early in the case.

Omnibus Objections to Claims. In some cases, debtors have filed objections covering hundreds of claims in a single filing, with an attached schedule itemizing the particular claims. Such "omnibus" objections to claims are an efficient means of resolving claims, but creditors frequently complain that they have a hard time finding their names in a thick list of claims to which objection is made, that the exact nature of the objection is difficult to ascertain, and that they find it too expensive and inefficient to respond to the objection at a single hearing on the motion with hundreds of other creditors.

To allow for the efficient administration of claims in large cases while at the same time ensuring that creditors receive the notice to which they are entitled as a matter of due process, some courts have adopted local rules to establish procedures applicable to omnibus claims objections, and amendments to Bankruptcy Rule 3007 will become effective December 1, 2007, absent contrary congressional action. Delaware Bankruptcy Local Rule 3007-1 is attached as Exhibit III-4. The Delaware rule requires that an omnibus objection be filed either as a substantive or nonsubstantive objection, and it deems all objections to be substantive unless they are based on the claim being duplicative, filed in the wrong case, amended or superseded, filed late, filed without supporting documents, or filed based on ownership of stock by a stockholder. (Some courts preclude omnibus objections to claims on substantive grounds absent approval of the court.) The Delaware rule also sets out the form in which the supporting exhibits must be presented; the form requires (among other things) identifying information about the claims and the basis for the objection. If the claim to which an objection is made is substantive in nature, the exhibit must give "sufficient detail as to why the claim should be disallowed"; the rule provides examples of the level of detail that qualifies as "sufficient." The rule also limits to 150 the number of claims to which a substantive objection is made that may be covered by an omnibus objection and states that no more than two substantive objections may be filed each calendar month, absent court order.

The proposed amendments to Bankruptcy Rule 3007 would permit objections to no more than 100 claims to be joined in a single pleading if all the claims were filed by the same entity or if the objections to the claims were based solely on the grounds that the claim should be disallowed, in whole or in part, for limited reasons enumerated in the proposed amended rule. The amendments also impose various procedural requirements to make it easier for a claimant to locate its claim and the nature of the objections to it within the omnibus objection and in other omnibus objections that are filed. Finally, the rule clarifies that an order resolving an objection to any particular

claim is treated, for purposes of finality, as if the claim had been the subject of an individual objection.

Even in the absence of a rule setting forth limitations on omnibus objections, a bankruptcy judge may wish to impose limitations on such filings by order. An example of provisions that one court has inserted in an order for a mega-case is attached as Exhibit III-5. Among the requirements the court may consider imposing are the following:

- the party filing the omnibus objection should state in a conspicuous place that claimants receiving the objection should locate their names and claims listed in the objection;
- the title of the objection should describe the types of objections included;
- similar objections should be grouped together;
- claimants should be listed alphabetically and a cross-reference should be provided to each claim to which objection is made, including multiple cross-references if a claim is objectionable on different grounds;
- the basis for any objection should be stated clearly for each individual claim;
- a limitation should be placed on the number of claims that can be covered by a single omnibus objection;
- omnibus objections should be limited to those that are nonsubstantive in nature, such as objections based on the claim being duplicative, filed in the wrong case, amended, superseded, or filed late; and
- individual notice of the objection should be required and should identify where the claimant is listed.

Negotiation of Disputed Claims. Some bankruptcy judges, to resolve as many disputed claims as possible without judicial action, require the claimant and the objecting party to negotiate with respect to a disputed claim before judicial resolution is sought.

For example, if liability for a class of claims is not contested but the amount of individual claims is subject to dispute, one court in a mega-case approved a procedure by which the debtor sent each claimant in the class a notice setting forth the amount the debtor believed was owed based on the debtor's records and informing the creditor that if the creditor failed to respond to the notice within 40 days, the claim would be allowed in the amount stated. A creditor who did dispute the specified amount was required to explain the basis for the dispute and to include copies of any documentation substantiating the creditor's position. Representatives of the debtor then had to communicate (by telephone or in writing) with each creditor who disputed the debtor's figures and seek to resolve the differences. Only if the differences could not be resolved by the parties would the judge hold a hearing to resolve the amount of the claim.

Even when liability for claims is not conceded, the court may require that the parties seek to resolve potential objections over claims by negotiation prior to seeking judicial resolution. For example, the court may require that any creditor whose claim is the subject of an objection submit to the objecting party a written explanation of the basis of the claim, together with any documentation supporting it. The court then schedules a hearing on the objection only if the parties certify to the court that they are unable to resolve the objection by informal discussions. Exhibit III-6 is an example of an order establishing a procedure for resolving contested claims.

Resolution of Claims. Even if the court implements procedures to encourage private resolution of claims, some claims will remain unresolved despite negotiation between the parties, and the court will have to determine an appropriate resolution. The bankruptcy court has the power to hear and determine all core proceedings arising in a bankruptcy case, including the allowance or disallowance of claims against the estate, but the court may not liquidate or estimate contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution. 28 U.S.C. § 157(b)(2)(B). Personal injury tort and wrongful death cases must be tried in the district court rather than the bankruptcy court. *Id.* § 157(b)(5). If an individual claim is not of this type, the court is directed by Bankruptcy Code § 502(b) to determine a disputed claim "after notice and a hearing."

If multiple disputed claims present common questions of law or fact, under Federal Rule of Civil Procedure 42, made applicable to bankruptcy cases under Bankruptcy Rules 7042 and 9014(c), the court "may order a joint hearing or trial of any or all the matters in issue in the actions" to make the resolution process more efficient. If the court decides to conduct a joint trial, it must be sensitive to the due process rights of each claimant to participate in the joint proceedings.

Alternatively, the claim may be subject to mandatory or discretionary abstention under 28 U.S.C. § 1334(c), in which event the claim may be liquidated through normal state court proceedings if relief from the stay is granted.

Estimation of Claims. The mega-case frequently involves large numbers of claims, making individual resolution of claims by the bankruptcy court impracticable. Bankruptcy Code § 502(c) permits the court to "estimate[] for purpose of allowance . . . any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case." The court should be careful not to become confused by the terminology of claims. For a discussion of the concepts of "contingent," "unliquidated," and "disputed" claims, see, e.g., *In re Mazzeo*, 131 F.3d 295 (2d Cir. 1997); *In re Knight*, 55 F.3d 231 (5th Cir. 1995); *In re Nicholes*, 184 B.R. 82 (9th Cir. BAP 1995).

Although, as indicated above, the bankruptcy court may not estimate contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a bankruptcy case, "estimation of claims or interests for the purposes of confirming a plan" is expressly described as a core proceeding. 28

U.S.C. § 157(b)(2)(B). Courts may estimate claims not only for the purpose of distributions, *see, e.g.*, *In re* Windsor Plumbing Supply Co., 170 B.R. 503 (Bankr. E.D.N.Y. 1994), or voting on a plan of reorganization, *see, e.g.*, *In re* Trident Shipworks, Inc., 247 B.R. 513 (Bankr. M.D. Fla. 2000); *In re* Federal Press Co., 116 B.R. 650 (Bankr. N.D. Ind. 1989), but also for the purpose of determining the feasibility of a plan, *see, e.g.*, *In re* Pacific Gas & Electric Co., 295 B.R. 635 (Bankr. N.D. Cal. 2003).

Estimation of claims has become particularly crucial in connection with mega-cases involving mass tort claims in which the debtor seeks to quantify its total tort liability. Although the language of Bankruptcy Code § 502(c) suggests estimation of claims on an individual basis, courts have concluded that they are authorized by that section to estimate aggregate liability with respect to a class of claims. *See, e.g., In re* A.H. Robins Co., 880 F.2d 709 (4th Cir. 1989); Owens Corning v. Credit Suisse First Boston, 2005 WL 756747 (D. Del. 2005); *In re* G-I Holdings, Inc., 2005 WL 758193 (Bankr. D.N.J. 2005); *In re* Eagle-Picher Industries, Inc., 189 B.R. 681 (Bankr. S.D. Ohio 1995). Before estimation is appropriate, the court must determine that the disputed claim is a "claim" within the meaning of Bankruptcy Code § 101(5), that the claim is contingent or unliquidated, and that fixing or liquidating the claim would in fact unduly delay the bankruptcy case. *See, e.g.*, *In re* G-I Holdings, Inc., 2005 WL 758193 (Bankr. D.N.J. 2005). At least one court has declined to estimate mass tort claims against a debtor in a mega-case on the grounds that the delay associated with liquidating tort claims outside the bankruptcy court would not be unjustifiable. *See In re* Dow Corning Corp., 211 B.R. 545 (Bankr. E.D. Mich. 1997). *See also In re* Apex Oil Co., 107 B.R. 189 (Bankr. E.D. Mo. 1989).

Even when the court is asked to estimate individual mass tort claims for the purpose of voting on a plan of reorganization, the process may be a complicated one. At this stage of the case, there may be little known about the real ailments of the claimants and the true value of the claims or, indeed, whether the debtor is liable for the claims at all. As a result, assigning appropriate values to individual claims is very difficult. Some courts have approached this problem by initially assigning an equal value to all of the claims for voting purposes (such as $1.00 per claim), reserving the right for any claimant to request that the court assign a different value to a claim based on the seriousness of the claimant's injuries if the outcome of the voting would be affected by assigning a different value. If (as is often the case) the plan is accepted or rejected by an overwhelming majority of claimants in the class, the court need not spend additional time to assign different values to individual claims.

Neither the Bankruptcy Code nor the Bankruptcy Rules set forth any procedures for estimation of claims. Bankruptcy judges may choose "whatever method is best suited to the particular contingencies at issue," Bittner v. Borne Chemical Co., 691 F.2d 134, 135 (3d Cir. 1982), and can be reversed only for abuse of discretion in adopting appropriate procedures. *See, e.g.*, Kool, Mann, Coffee & Co. v. Coffey, 300

F.3d 340, 357 (3d Cir. 2002). Estimation procedures may be established by stipulation among the parties or by judicial order after consultation. Among the methods courts have considered employing are

- complete evidentiary trial;
- abbreviated or summary trial;
- accepting claimant's claim at face value;
- estimating claim at zero and waiving discharge of the claim under Bankruptcy Code § 1141(d);
- review of submitted documents; and
- expert testimony.

An example of an order providing procedures for estimation of claims through a summary trial is attached as Exhibit III-7. The goal of any process is the quick and efficient rough estimation of the claim, not precise liquidation of the claim. For a more detailed discussion of methods for estimation of claims in mass tort bankruptcy mega-cases, see S. Elizabeth Gibson, *Judicial Management of Mass Tort Bankruptcy Cases* (Federal Judicial Center 2005).

Appeals

Prior to the 2005 Amendments, only the U.S. district courts had jurisdiction to hear appeals from the bankruptcy court, 28 U.S.C. § 158(a), unless, with the consent of all parties, an appeal was taken to a bankruptcy appellate panel in the circuit to which a majority of the district judges in the district had authorized appeals be taken under 28 U.S.C. § 158(b)(6).

The 2005 Amendments confer on the applicable court of appeals jurisdiction over appeals from the bankruptcy court if the court of appeals authorizes direct appeal of a judgment, order, or decree and either the bankruptcy court, the district court, or the bankruptcy appellate panel involved certifies, or all the appellants and appellees (if any) acting jointly certify, that one of three situations exists:

- the judgment, order, or decree involves a question of law as to which there is no controlling decision of the applicable court of appeals or the U.S. Supreme Court, or involves a matter of public importance;
- the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
- an immediate appeal may materially advance the progress of the case or proceeding in which the appeal is taken.

28 U.S.C. § 158(d)(2)(A). The bankruptcy court, district court, or bankruptcy appellate panel must make such certification if it is requested to do so by a majority of the appellants and a majority of the appellees (if any). *Id.* § 158(d)(2)(B). Any such re-

quest for certification must be made not later than 60 days after the entry of the judgment, order, or decree, *id*. § 158(d)(2)(E), although there is no deadline for the certification itself. An uncodified provision in P.L. No. 109-8, § 1233(b)(4), requires that a petition requesting permission to appeal be filed not later than 10 days after a certification is entered on the docket. A timely notice of appeal must also be filed. *See* Bankruptcy Rule 8002. The Advisory Committee on Bankruptcy Rules has published proposed amendments to Bankruptcy Rule 8001 to implement these statutory revisions.

IV. The Process of Confirming a Plan

Development of the Reorganization Plan

A successful Chapter 11 case culminates in the confirmation of a plan of reorganization that allocates reorganization value among the parties in interest. Although the negotiations necessary to achieve this result are primarily the responsibility of the interested parties, the bankruptcy judge can, where appropriate, play a role directly and indirectly in facilitating a successful completion to the case. Direct assistance can come in the form of facilitating negotiations. Indirect assistance can come in the form of tight control over the timing of negotiations and the fees charged for unproductive activities.

Facilitation of Negotiations. When the interested parties appear unable to resolve their differences, the bankruptcy judge must consider the role, if any, that the judge wishes to take in getting negotiations back on track The response of the court will differ depending on the facts and circumstances of the case, including when the impasse occurs, the reasons for the parties' inability to continue discussions, and the judge's views on how involved the judge should be in the details of negotiations in the absence of a formal dispute requiring judicial resolution.

Of course, the impediment to negotiations may be an issue that could be the subject of judicial resolution. For example, the parties may differ over an issue of law that the court could resolve. Or the parties may be unable to deal with certain claims until they are resolved or estimated through a formal proceeding. In these instances, the judge may wish to encourage the parties to take the appropriate action to obtain judicial resolution of the matters required for efficient negotiations to resume. In such circumstances, the judge must rule promptly on matters that have been argued and submitted to the court or the negotiations will be stymied.

Some courts have found it useful to use third-party mediators to facilitate negotiations. In some cases, courts have used the district's mediation system with the parties' consent. In other cases, the bankruptcy judge to whom the case is assigned has requested that another bankruptcy judge assume an active role as a mediator in plan negotiations.

The court may also consider appointing an examiner pursuant to Bankruptcy Code § 1104(c) for the purpose of acting as a mediator in plan negotiations. The Bankruptcy Code does not explicitly authorize the appointment of an examiner for this purpose. Under section 1104(c), the examiner is appointed "to conduct such an investigation of the debtor as is appropriate." However, under Bankruptcy Code § 1106(b), an examiner is directed to perform the duties specified in section 1106(a)(3), which include not only an investigation relating to the debtor, but also of "any other matter relevant to the case or to the formulation of a plan." Relying on this broad language, some courts have included among the tasks allotted to the exam-

iner the role of mediator with respect to outstanding disputes and facilitator of plan negotiations. *See, e.g., In re* Maxwell Communication Corp., 93 F.3d 1036, 1042 (2d Cir. 1996); *In re* Big Rivers Electric Corp., 213 B.R. 962, 966 (Bankr. W.D. Ky. 1997); *In re* Apex Oil Co., 101 B.R. 92, 93 (Bankr. E.D. Mo. 1989); *In re* Public Service Co., 99 B.R. 177 (Bankr. D.N.H. 1989); *In re* UNR Industries, Inc., 72 B.R. 789 (Bankr. N.D. Ill. 1987). However, the authority to appoint an examiner solely for such purpose, in the absence of investigatory responsibilities, is unclear. *See* Official Committee of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 578 (3d Cir. 2003) ("§ 1106(b)'s broad grant is most naturally interpreted to authorize only acts relating directly to investigation").

If an examiner is appointed, the order should describe with specificity the examiner's duties. The court may want to caution the examiner not to assume tasks outside the scope of the order. For example, the examiner should not attempt to force a particular plan on the parties, but should assist the parties in formulating their own plan. The examiner should deal with the judge in the same manner as all other parties in interest; ex parte communications are inappropriate under Bankruptcy Rule 9003(a). The examiner will be unable to function effectively in the role of mediator if the parties believe the judge is privy to the details of the negotiation process.

Exclusivity. Under Bankruptcy Code § 1121(b), "only the debtor may file a plan until after 120 days after the date of the order for relief." The bankruptcy court has the authority, on request of a party in interest and after notice and a hearing, to reduce or increase the 120-day exclusivity period "for cause." Bankruptcy Code § 1121(d)(1). An interlocutory order issued under section 1121(d) reducing or increasing the exclusivity period is subject to appeal to the district court as a matter of right. 28 U.S.C. § 158(a)(2).

The 2005 Amendments prohibit the court from extending exclusivity beyond a date that is 18 months after the date of the order for relief. Bankruptcy Code § 1121(d)(2)(A). The prohibition was prompted by a belief that some bankruptcy judges had proven too willing to exercise their discretion to extend exclusivity "for cause," resulting in unduly lengthy bankruptcies for some debtors. During those extra months of bankruptcy, administrative expenses mounted, leaving little for unsecured creditors when the cases were finally confirmed.

Some parties assert that repeated extensions of exclusivity can prolong a case that should be moving more quickly. They contend that debtors who believe that they will routinely receive an extension of exclusivity beyond the 120-day period will have little incentive to begin serious negotiations with the various parties in interest to develop a plan of reorganization during that period. On the other hand, others assert that mega-cases tend to be complex and that if extensions of exclusivity are ever appropriate, such extensions are more likely to be warranted in such cases. Those parties also maintain that exclusivity sometimes assists in controlling expenses by avoiding development of competing plans that can delay real negotiations between

the parties. Parties may refuse to negotiate if they believe they can "wait out" the debtor's exclusive period to file a plan and instead file one of their own.

The Bankruptcy Code and Rules do not set forth factors that may establish "cause" for extending exclusivity within the meaning of section 1121(d). The decision rests with the discretion of the bankruptcy judge, and the debtor has the burden of proof. The judge must balance the goal of giving the debtor sufficient time to reorganize against the legitimate interests of creditors to have a say in the future of the company. Among the considerations listed by courts considering whether "cause" exists for an extension are the following:

- the size and complexity of the case;
- the necessity of sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate information;
- the existence of good-faith progress toward reorganization;
- whether the debtor is paying its bills as they come due;
- whether the debtor has demonstrated reasonable prospects of filing a viable plan;
- whether the debtor has made progress in negotiations with its creditors;
- the amount of time that has elapsed in the case;
- whether the debtor is seeking an extension to pressure creditors to submit to the debtor's reorganization demands; and
- whether an unresolved contingency exists.

See In re Dow Corning Corp., 208 B.R. 661, 664–65 (Bankr. E.D. Mich. 1997). *See also In re* Central Jersey Airport Services, LLC, 282 B.R. 176, 184 (Bankr. D.N.J. 2002); *In re* Service Merchandise Co., 256 B.R. 744, 751 (Bankr. M.D. Tenn. 2000); *In re* Express One International, Inc., 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996).

Denial of a request to extend the debtor's period of exclusivity can either accelerate serious negotiations between the parties over a plan of reorganization or terminate all negotiations as the parties prepare to file competing plans. A similar result may ensue if the bankruptcy judge grants a motion to shorten the debtor's period of exclusivity under Bankruptcy Code § 1121(d)(1). As is true for motions to extend the period, the bankruptcy judge may grant a motion to reduce the period "for cause." Factors considered by courts finding cause for reducing the exclusivity period have included the following:

- the debtor's use of exclusivity to force creditors to accept an unsatisfactory or unconfirmable plan;
- the debtor's delay in filing a plan;
- gross mismanagement of the debtor's operations;

- internal dissension between the debtor's principals; and
- the debtor files a nonconsensual "new value" plan.

See In re Situation Management Systems, Inc., 252 B.R. 859 (Bankr. D. Mass. 2000).

With the new absolute prohibition on extensions of exclusivity beyond 18 months after the order for relief, bankruptcy courts may be more willing to find "cause" for extensions that do not exceed the 18-month limit, and may find less reason to reduce the debtor's period of exclusivity.

Disclosure and Confirmation

Once a plan is filed with the court, whether by the debtor or by another party in interest, the process of obtaining confirmation of that plan begins. Confirmation of a plan requires, among other things, that each impaired class of claims or interests accept the plan, unless the plan proponent seeks to confirm a "cramdown" plan under Bankruptcy Code § 1129(b). A class of claims accepts a plan if it is accepted by creditors holding at least 2/3 in amount and more than 1/2 in number of the allowed claims in the class held by creditors that have voted on the plan (excluding any entities designated under section 1126(e)). Bankruptcy Code § 1126(c). Acceptance by a class of interests requires an affirmative vote by holders of at least 2/3 in amount of the allowed interests in such class (excluding any entities designated under section 1126(e)). *Id.* § 1126(d). A plan proponent may not solicit acceptance or rejection of a plan from a holder of a claim or interest "unless, at the time of or before such solicitation, there is transmitted to such holder . . . a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information." *Id*. § 1125(b). However, under the 2005 Amendments, an acceptance or rejection of the plan may be solicited before the commencement of the case in compliance with applicable nonbankruptcy law. *Id*. § 1125(g). The disclosure statement hearing, and the confirmation hearing under Bankruptcy Code § 1129 after the solicitation of votes on the proposed plan is completed, represent the culmination of the mega-case.

Disclosure Statement. The purpose of the disclosure statement hearing is to determine whether the proposed written disclosure statement of the plan proponent contains "adequate information" within the meaning of Bankruptcy Code § 1125(a)(1). "Adequate information" is defined as

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan.

The 2005 Amendments direct the bankruptcy court, in determining whether the disclosure statement contains adequate information, to "consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information." Bankruptcy Code § 1125(a)(1).

In theory, whether the proposed plan satisfies the requirements for confirmation under Bankruptcy Code § 1129 has no bearing on whether the disclosure statement contains adequate information. Therefore, some courts are reluctant to entertain objections to the disclosure statement if those objections constitute attacks on the plan itself. Other courts see the disclosure statement hearing as an opportunity for all parties to raise objections to the plan, objections that may result in necessary modifications before solicitation occurs. The case may be needlessly delayed if the holders of claims and interests vote on a plan that contains a violation of the Bankruptcy Code. The court may consider permitting the solicitation to proceed if any defect in the plan would be mooted by a favorable vote but denying approval of the disclosure statement if the defect would preclude confirmation in any event.

How much information is necessary to be "adequate"? The nature of a mega-case may suggest that more information is required, but the goal of the disclosure statement in a mega-case is the same as in a more routine case—providing enough information in a form comprehensible to the readers to enable them to understand how the plan affects them. Because mega-cases tend to have many different types of claimants, some of whom will have little understanding of legal terminology, the court may want to require that the disclosure statement be written in plain English, perhaps with a cover letter explaining what it is. Some courts have found it useful to have a layperson, such as an employee of the clerk's office, read the disclosure statement and point out any parts that are difficult to understand.

Another approach is for the plan proponent to submit for approval summary disclosure statements that contain key information for a particular target group of claimants or interest holders. If the plan proponent wishes, the summary disclosure statement can accompany the regular disclosure statement and can contain appropriate cross-references to the sections in the regular disclosure statement where a more detailed discussion is available. The summary disclosure statement is designed to include the key information relevant to a particular group of creditors or interest holders in a form more accessible than selected provisions of a much more detailed disclosure statement. Bankruptcy Code § 1125(c) explicitly contemplates the possibility of different disclosure statements for different classes.

The court may be asked to approve disclosure statements relating to proposed competing plans. Such disclosure statements may contain information that is substantively inconsistent, such as different liquidation analyses. In such a situation, the court need not rule on which information is correct, because that issue is not before the court. Each disclosure statement may contain adequate information, despite the

differences, so long as each discloses that a dispute exists over the accuracy of the information. Some courts may order a combined disclosure statement be prepared describing proposed competing plans.

Approval of any disclosure statement or statements by the court does not, of course, mean that the court has determined that the information included therein is accurate, merely that it is adequate. Nor is approval of the disclosure statement an indication that the court has determined that the plan has been approved or is confirmable. The court should make sure that the plan proponents do not misrepresent the scope of the court's approval.

When there is opposition to a proposed plan, some parties who oppose the plan may wish to provide holders of claims or interests with information that contradicts information included in the approved disclosure statement or to urge the holders to vote against the plan. Such communications, even when soliciting negative votes on the proposed plan, do not violate any provision of the Bankruptcy Code, including section 1125(b). So long as such communications follow transmission of the approved disclosure statement and do not solicit acceptance or rejection of a competing plan for which an approved disclosure statement has not been distributed, they are permitted without court approval. *See* Century Glove, Inc. v. First American Bank of New York, 860 F.2d 94, 100 (3d Cir. 1988); *In re* Apex Oil Co., 111 B.R. 245 (Bankr. E.D. Mo. 1990). However, when the party sending such communications seeks rejection of the proposed plan by comparing it to another competing plan for which an approved disclosure statement has not been distributed, it may be in violation of Bankruptcy Code § 1125(b), even if an explicit solicitation of votes for the competing plan is not included. *See, e.g., In re* Aspen Limousine Service, Inc., 198 B.R. 341 (D. Colo. 1996); *In re* CGE Shattuck, LLC, 254 B.R. 5 (Bankr. D.N.H. 2000).

Confirmation. Bankruptcy Code § 1128 requires that "[a]fter notice, the court shall hold a hearing on confirmation of a plan." Even in the absence of any objection to confirmation, the proponent of the plan must affirmatively demonstrate to the court that the plan meets the requirements for confirmation set forth in Bankruptcy Code § 1129. *See In re* Woodstock Associates I, Inc., 120 B.R. 436, 453 (Bankr. N.D. Ill. 1990). If no objection is timely filed, Bankruptcy Rule 3020(b)(2) provides that the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

This does not mean that the plan proponent must file a lengthy brief describing the requirements of section 1129 in support of its motion to confirm the plan. Indeed, the court may wish to direct counsel that fees will not be awarded for time spent preparing such a brief for a consensual plan with no objections. If the bankruptcy judge wishes to receive a brief, the judge may specify the issues to be addressed and how long the brief should be. Some courts find it useful to receive a summary chart of the requirements of section 1129 listing the evidence the proponent intends to introduce

in order to satisfy the requirements and any objections and responses that have been filed with respect to each requirement.

A proposed plan of reorganization may be confirmed by the bankruptcy judge only if it meets all of the requirements for confirmation set forth in Bankruptcy Code § 1129(a) or is confirmed as a cramdown plan under section 1129(b). Any party in interest may file an objection to confirmation of the proposed plan. Pursuant to Bankruptcy Rule 3020(b)(1), each objection is treated as commencing a contested matter under Bankruptcy Rule 9014.

If objections are timely filed, the court should make clear to the parties prior to the confirmation hearing how the hearing will be conducted, perhaps by holding a pretrial conference and then entering a pretrial order specifying (for example) the types of evidence to be presented and any limits on the number of witnesses or the time allotted for each objection. Exhibit IV-1 is a sample scheduling order. The court should consider the litigation management techniques discussed earlier in this Guide in conducting the confirmation hearing.

Two issues may cause particular concern in connection with confirmation of plans of reorganization in mega-cases—feasibility and third-party releases. Under Bankruptcy Code § 1129(a)(11), a plan cannot be confirmed unless "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." Even if no objection to the plan is made, the court must determine that the plan is feasible within the meaning of section 1129(a)(11). To meet the requirement of feasibility, the debtor must establish that it is able to consummate the provisions of the plan, and that the plan will enable the debtor to emerge from bankruptcy as a viable entity. *See In re* Lakeside Global II, Ltd., 116 B.R. 499, 506 (Bankr. S.D. Tex. 1989). Success of the plan does not have to be guaranteed. However, the plan must offer a reasonable prospect of success as opposed to visionary or speculative schemes. *See In re* Pikes Peak Water Co., 779 F.2d 1456, 1460 (10th Cir. 1985); *In re* Pizza of Hawaii, Inc., 761 F.2d 1374, 1382 (9th Cir. 1985). Among the factors considered by the court in determining if a plan is feasible are:

- the adequacy of the debtor's financial structure;
- the earning power of the debtor's business;
- the ability of the debtor's management;
- the probability of continuity of management; and
- economic conditions.

See, e.g., In re Prussia Associates, 322 B.R. 572, 584 (Bankr. E.D. Pa. 2005); *In re* WCI Cable, Inc., 282 B.R. 457, 486 (Bankr. D. Or. 2002). The court has an obligation to scrutinize financial projections carefully—even if the debtor's financial pro-

fessional testifies that the projections are realistic and no objection has been filed—to ensure that they are not unduly aspirational in light of the debtor's financial history and that the projections demonstrate an ability to meet the debtor's obligations under the plan.

Proposed plans of reorganization for debtors in mega-cases frequently include provisions providing for releases of parties other than the debtor from liability. Bankruptcy Code § 524(e) provides that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." Based on this provision, some courts have concluded that permanent injunctions protecting nondebtors from liability to nonconsenting creditors are prohibited in reorganization plans. *See In re* Lowenschuss, 67 F.3d 1394, 1401 (9th Cir. 1995); *In re* Zale Corp., 62 F.3d 746, 760 (5th Cir. 1995); *In re* Western Real Estate Fund, Inc., 922 F.2d 592, 600 (10th Cir. 1990), *modified sub nom.* Abel v. West, 932 F.2d 898 (10th Cir. 1991); *In re* Coram Healthcare Corp., 315 B.R. 321, 335 (Bankr. D. Del. 2004).

However, other courts have allowed such permanent injunctions under limited circumstances. *See, e.g., In re* Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002); *In re* Specialty Equipment Cos., 3 F.3d 1043, 1047 (7th Cir. 1993); *In re* Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 293 (2d Cir. 1992); *In re* A.H. Robins Co., 880 F.2d 694, 701–02 (4th Cir. 1989). Most of these courts look to the presence of certain factors justifying the injunction. These include

- the third party made an important contribution to the reorganization;
- the release is "essential" or "important" to the reorganization;
- a large majority of the creditors affected by the injunction approved the plan containing the release;
- there is a close connection between the cases against the third party or parties and the case against the debtor; and
- the plan provides for full or substantially full payment of the claims affected by the release.

See, e.g., In re Metromedia Fiber Network, Inc., 416 F.3d 136, 142 (2d Cir. 2005); *In re* Prussia Associates, 322 B.R. 572, 597 (Bankr. E.D. Pa. 2005). *Cf. In re* Continental Airlines, 203 F.3d 203, 214 (3d Cir. 2000) (declining to decide whether such releases are ever permitted when release in the plan lacked "hallmarks of permissible nonconsensual releases—fairness, necessity to the reorganization, and specific factual findings to support these conclusions").

If the applicable law in the bankruptcy court's jurisdiction authorizes such releases, the bankruptcy judge should examine the release in the proposed plan in light of the relevant factors even if no objection to the release has been made. If the re-

lease is justified, the judge should include the appropriate findings in the confirmation order.

Confirmation Order. Upon confirmation of a plan of reorganization, the bankruptcy judge will be asked to enter a confirmation order. Although Official Form 15 suggests that such an order be short and simple, in a mega-case counsel often present the court (often while the judge is still on the bench at the end of the confirmation hearing) with an order that is as lengthy as the plan and as difficult to parse.

Among the provisions counsel have included in confirmation orders are third-party releases not contemplated by the plan, injunctions against governmental units and other parties who have no connection to the case, findings of fact for which no evidence was presented at the confirmation hearing, and other provisions that are inappropriate or illegal. Such proposed confirmation orders may also improperly state that in the event of conflict between the provisions of the plan and the provisions of the confirmation order, the provisions of the order prevail.

To avoid being ambushed by such a confirmation order, the judge may wish to inform the parties prior to the confirmation hearing that the judge will not sign a confirmation order that varies from Official Form 15 unless the modification is supported by evidence presented at the hearing and good cause justifies the change. For example, as suggested above, any third-party release provided by the plan and approved by the judge should be supported by appropriate findings in the confirmation order. In addition, Bankruptcy Rule 3020(c)(1) requires that if the plan provides for an injunction against conduct not otherwise enjoined under the Code, the confirmation order must "(1) describe in reasonable detail all acts enjoined; (2) be specific in its terms regarding the injunction; and (3) identify the entities subject to the injunction."

Alternatively, the court may require that the plan proponent submit a proposed form of confirmation order to the court not later than five days prior to the confirmation hearing, together with a cover sheet identifying, for each provision of the order, the location of the corresponding provision in the plan. The judge can then review the form prior to the confirmation hearing and be prepared to accept or reject any specific provisions.

In signing a confirmation order, the court must always ensure that there are no inconsistencies between the order and the plan.

Postconfirmation Problems

Parties in a mega-case, just like those in any confirmed Chapter 11 case, may confront issues after confirmation that they believe require judicial relief. The Bankruptcy Code itself contemplates that the bankruptcy court will continue to have authority to rule on certain matters even after confirmation of a plan. For example, Bankruptcy Code § 1129(a)(4) imposes as a requirement for confirmation of a plan

that "[a]ny payment . . . to be made . . . under the plan, . . . or in connection with the plan and incident to the case, . . . is subject to the approval of, the court as reasonable." This provision can be implemented only if the court has jurisdiction to approve such payments after confirmation of the plan. Other examples include:

- authority to convert or dismiss a case based on postconfirmation events under sections 1112(b)(4)(L)–(O);
- confirmation of a modified plan after confirmation of the original plan under sections 1127(b) and (f)(2);
- determination of debts excepted from discharge under sections 1141(d)(2), (3), and (6);
- granting of a discharge to an individual Chapter 11 debtor under section 1141(d)(5);
- authority for the court to issue orders necessary for consummation of the plan under section 1142(b); and
- revocation of order of confirmation under section 1144.

When the postconfirmation dispute is not one Congress has specifically directed that the bankruptcy judge address, it may be unclear whether the court has jurisdiction over the matter or whether the parties should be relegated to a nonbankruptcy forum to resolve the controversy.

Jurisdiction of the Bankruptcy Court. After a plan of reorganization has been confirmed in a Chapter 11 case, the bankruptcy judge continues to have jurisdiction of the case and proceedings arising under title 11 or arising in a title 11 case (which are generally equated with core proceedings described in 28 U.S.C. § 157(b)(2)). Bankruptcy Rule 3020(d) recognizes the retained power of the bankruptcy court after entry of the confirmation order to "issue any other order necessary to administer the estate."

However, most courts have concluded that the bankruptcy court's jurisdiction over related proceedings after confirmation is more limited than that described in the widely cited opinion in *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). Although different courts express the limitations on their postconfirmation jurisdiction in varying ways, all look for a close connection between the matter at issue and the debtor's implementation of the reorganization plan. *See, e.g., In re* Pegasus Gold Corp., 394 F.3d 1189, 1194 (9th Cir. 2005) ("close nexus to the bankruptcy proceeding"); *In re* Resorts International, Inc., 372 F.3d 154, 166 (3d Cir. 2004) ("whether there is a close nexus to the bankruptcy plan or proceeding"); *In re* Craig's Stores of Texas, Inc., 266 F.3d 388, 390–91 (5th Cir. 2001) (jurisdiction only "for matters pertaining to the implementation or execution of the plan"); *In re* Walker, 198 B.R. 476, 482 (Bankr. E.D. Va. 1996) (dispute must "affect successful implementation and consummation of the plan"); Eubanks v. Esenjay Petroleum Corp., 152 B.R. 459, 464

(E.D. La. 1993) (proceeding must have a "conceivable effect on the debtor's ability to consummate the confirmed plan").

Frequently, the proposed plan of reorganization contains language purporting to confer continuing jurisdiction on the bankruptcy court over a broad range of matters that might arise postconfirmation. Such a provision will be given effect if the scope of jurisdiction described in the plan does not exceed that specified by Congress. However, the parties cannot confer on the bankruptcy judge jurisdiction that goes beyond that contemplated by the Judicial Code. "Where a court lacks subject matter jurisdiction over a dispute, the parties cannot create it by agreement even in a plan of reorganization." *In re* Resorts International, Inc., 372 F.3d 154, 161 (3d Cir. 2004). *See also In re* U.S. Brass Corp., 301 F.3d 296, 303 (5th Cir. 2002). Therefore, the bankruptcy judge may wish to caution the plan proponent that any jurisdictional language in the plan that is broader than the court's statutory authority will not be effective.

If the plan of reorganization does not purport to confer continuing postconfirmation jurisdiction on the bankruptcy court, some courts have concluded that they may not exercise such jurisdiction, even if it would otherwise be available under 28 U.S.C. § 1334. *See, e.g., In re* Johns-Manville Corp., 7 F.3d 32, 34 (2d Cir. 1993); *In re* Sunbrite Cleaners, Inc., 284 B.R. 336, 340 (N.D.N.Y. 2002); Falise v. American Tobacco Co., 241 B.R. 48, 58–59 (E.D.N.Y. 1999); *In re* Linc Capital, Inc., 310 B.R. 847, 855 (Bankr. N.D. Ill. 2004); *In re* Gallien, 214 B.R. 583, 585 (Bankr. E.D. Ark. 1997). *But see In re* Refrigerant Reclamation Corp., 186 B.R. 78, 80 (Bankr. M.D. Tenn. 1995) (postconfirmation jurisdiction is determined by broad jurisdictional grant of 28 U.S.C. § 1334, not terms of plan).

The confirmation order is, of course, a binding final order of a court of competent jurisdiction, entitled to res judicata effect if all other requirements for application of that doctrine are satisfied. *See, e.g.*, Stoll v. Gottlieb, 305 U.S. 165, 170–71 (1938); *In re* Consolidated Water Utilities, Inc., 217 B.R. 588, 590 (9th Cir. BAP 1998). *See also* Bankruptcy Code § 1141(a). Application of the doctrine of res judicata with respect to a claim generally requires a final decision of the merits by a court of competent jurisdiction; a subsequent action between the same parties or those in privity with them; and an identity of the claims in the prior and subsequent action. *See, e.g.*, D&K Properties Crystal Lake v. Mutual Life Insurance Co., 112 F.3d 257, 259 (7th Cir. 1997); Bittinger v. Tecumseh Products Co., 123 F.3d 877, 880 (6th Cir. 1997); *In re* Varat Enterprises, Inc., 81 F.3d 1310, 1315 (4th Cir. 1996). Under the doctrine of claim preclusion, such a final order or judgment "is an absolute bar to the subsequent action or suit between the same parties . . . not only in respect of every matter which was actually offered . . . but also as to every ground of recovery which might have been presented." Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 319 (1927). Therefore, the court should not entertain a postconfirmation proceeding between parties in interest if the subject matter of that proceeding was actually raised, or could

have been raised, in connection with confirmation. *See, e.g., In re* Justice Oaks II, Ltd., 898 F.2d 1544, 1552 (11th Cir. 1990). Such a proceeding constitutes an impermissible collateral attack on the confirmation order.

Postconfirmation Issues

Allowance of Fees and Reimbursement of Expenses. As mentioned above, under Bankruptcy Code § 1129(a)(4) a plan can be confirmed only if all payments to be made under the plan for services or costs and expenses in connection with the case or in connection with the plan are subject to the approval of the court as reasonable. Therefore, the court continues to have jurisdiction to rule on the reasonableness of fees to be paid postconfirmation but earned preconfirmation under a confirmed plan. *See, e.g., In re* Anderson Grain Corp., 222 B.R. 528 (Bankr. N.D. Tex. 1998) (requiring disgorgement of fees paid to postconfirmation financer). Those postconfirmation fees may include those requested by professionals who have received interim compensation during the course of the case. *See* Exhibit IV-2 for a sample order setting out final fee application procedures. After approval of final fee awards, the court may choose to limit its postconfirmation involvement in the payment of fees to resolution of disputes except in the case of a liquidation.

Allowance of Administrative Expense Claims. No time period for filing administrative expense claims is set forth in the Bankruptcy Code or the Bankruptcy Rules. Although Bankruptcy Code § 503(a) requires that requests for payment of administrative expenses be "timely" filed (unless tardy filing is permitted by the court "for cause"), Congress left to the bankruptcy court the task of establishing specific filing deadlines. Because administrative expenses continue to accrue throughout a Chapter 11 bankruptcy, a bankruptcy court is likely to establish an administrative claims bar date that is after confirmation of the plan (or even after the effective date of the plan).

In its order approving the disclosure statement and fixing the date of the confirmation hearing, the court may wish to include a provision fixing a deadline to file a request for an award of administrative expenses. A request for payment of an administrative expense claim, unlike a properly filed proof of claim (*see* Bankruptcy Code § 502(a) and Bankruptcy Rule 3001(f)), does not constitute prima facie evidence of the validity and amount of the claim and is therefore not deemed allowed in the absence of an objection. *See, e.g., In re* B & W Tractor Co., Inc., 38 B.R. 613, 616–17 (Bankr. E.D.N.C. 1984).

Administrative expenses may be allowed after notice and a hearing. Bankruptcy Code § 503(b). The bankruptcy court retains jurisdiction to allow administrative expense claims after confirmation of the plan. *See, e.g., In re* DP Partners Ltd., 106 F.3d 667 (5th Cir. 1997) (awarding administrative expenses for making substantial contribution to the case under section 503(b)(3)(D)).

Revocation of Confirmation. If the order of confirmation was "procured by fraud," the bankruptcy court may revoke the order on request of a party in interest at any time before 180 days after the date of entry of the order. Bankruptcy Code § 1144(a). The court may not provide relief after the expiration of the 180-day period, even if the fraud is not discovered early enough to bring a timely motion. *See, e.g., In re* Coastline Care, Inc., 299 B.R. 373, 379 (Bankr. E.D.N.C. 2003); *In re* 680 Fifth Avenue Associates, 209 B.R. 314, 322–23 (Bankr. S.D.N.Y. 1997); *In re* Mission Heights Investors, L.P., 202 B.R. 131, 138 (Bankr. D. Ariz. 1996). *See also* Bankruptcy Rule 9024 ("a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144"); Bankruptcy Rule 9006(b)(2) ("the court may not enlarge the time for taking action under Rule[] . . . 9024"). A proceeding to revoke a confirmation order is an adversary proceeding. Bankruptcy Rule 7001(5).

Enforcement of Postconfirmation Injunction. Confirmation of a Chapter 11 plan generally discharges the debtor from preconfirmation debts under Bankruptcy Code § 1141(d)(1). That discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." Bankruptcy Code § 524(a)(2). Bankruptcy courts are uniformly held to have jurisdiction to enforce the permanent injunction. *See, e.g., In re* National Gypsum Co., 118 F.3d 1056, 1063 (5th Cir. 1997); *In re* United States Home Corp. of New York, 280 B.R. 330, 335 (Bankr. S.D.N.Y. 2002); *In re* Kewanee Boiler Corp., 270 B.R. 912, 918 (Bankr. N.D. Ill. 2002); *In re* Jacobs, 149 B.R. 983, 989 (Bankr. N.D. Okla. 1993).

Plan Modification. Bankruptcy Code § 1127(b) allows a plan proponent or the reorganized debtor to modify a confirmed plan, consistent with the requirements of Bankruptcy Code §§ 1122 and 1123, before substantial consummation of the plan. Once the plan has been substantially consummated, no further modification is permitted unless the debtor is an individual. *See, e.g., In re* U.S. Brass Corp., 301 F.3d 296, 307 (5th Cir. 2002); *In re* Coastline Care, Inc., 299 B.R. 373, 379 (Bankr. E.D.N.C. 2003); *In re* Bodega Bay Sunset Property, LLC, 2003 WL 22888939 (Bankr. N.D. Cal. 2003).

"Substantial consummation" is defined in Bankruptcy Code § 1101(2) as "(A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan." Whether a plan has been substantially consummated is a question of fact to be determined by the bankruptcy judge based on the facts and circumstances of each case. *See, e.g., In re* Jorgensen, 66 B.R. 104, 106 (9th Cir. BAP 1986).

If the plan is modified, the modified plan becomes the plan of reorganization for the case "if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129." Bankruptcy Code § 1127(b). Appropriate disclosure with respect to the modified plan under section 1125 is also required. *Id.* § 1127(f)(2). The court may conclude that no further disclosure is required if the modification is not material. *See, e.g., In re* Sun Apparel Warehouse, Inc., 2003 WL 21262691 (Bankr. E.D. Pa. 2003); *In re* American Solar King Corp., 90 B.R. 808, 823–24 (Bankr. W.D. Tex. 1988).

Interpretation of Plan. Generally, "[m]atters that affect the interpretation, implementation, consummation, execution, or administration of the confirmed plan will typically have the requisite close nexus" to confer jurisdiction on the bankruptcy court. *In re* Resorts International, Inc., 372 F.3d 154, 167 (3d Cir. 2004). *See also In re* Pegasus Gold Corp., 394 F.3d 1189, 1194 (9th Cir. 2005). When the parties are seeking judicial resolution of an ambiguity under the plan (or related agreements), the court is likely to find it has the required jurisdiction. *See, e.g., In re* A.H. Robins Co., 86 F.3d 364, 372 (4th Cir. 1996); *In re* Resorts International, Inc., 199 B.R. 113, 118–19 (Bankr. D.N.J. 1996). Indeed, the dispute may constitute a "core" matter if, for example, it turns on rights established by an order approving a sale of property from the estate, 28 U.S.C. § 157(b)(2)(N), involves an administrative claim against the estate, *id*. § 157(b)(2)(B), or in some other respect deals with "matters concerning the administration of the estate," *id.* § 157(b)(2)(A). *See, e.g., In re* Petrie Retail, Inc., 304 F.3d 223, 229–30 (2d Cir. 2002).

However, not every dispute involving the interpretation of preconfirmation orders falls within the jurisdiction of the bankruptcy court. For example, postconfirmation disputes over rights conferred by an order entered under Bankruptcy Code § 363 or an order approving a motion for an assumption and assignment of an executory contract or lease under Bankruptcy Code § 365 may arise between two nondebtor parties and have no impact on the prepetition creditors or the implementation of the plan. When parties seek to invoke bankruptcy court jurisdiction after confirmation of a plan, they should be prepared to demonstrate to the judge that jurisdiction exists, even if that dispute arises because of an order that the judge entered at or prior to confirmation.

Reopening the Case. Under Bankruptcy Code § 350(a), the bankruptcy judge is directed to close a bankruptcy case "[a]fter an estate is fully administered and the court has discharged the trustee." However, the court has the authority to reopen the case under Bankruptcy Code § 350(b) "to administer assets, to accord relief to the debtor, or for other cause." A case may be reopened on motion of the debtor or any other party in interest. Bankruptcy Rule 5010. The bankruptcy court also may have authority to reopen the case on its own motion. *See* Donaldson v. Bernstein, 104 F.3d 547, 552 (3d Cir. 1997). There is no time limit on a motion to reopen under Bankruptcy Rule 5010, and Rule 9024 states that such a motion is not subject to the one-

year limitation set forth in Federal Rule of Civil Procedure 60(b). *See, e.g., In re* Coastline Care, Inc., 299 B.R. 373, 376–77 (Bankr. E.D.N.C. 2003).

Conversion or Dismissal of Case. Bankruptcy Code § 1112(a) permits a debtor to convert a Chapter 11 case to a case under Chapter 7 unless the debtor is not the debtor in possession, the case was commenced on an involuntary basis, or the case was converted to Chapter 11 other than on the request of the debtor. The court is also required to convert or dismiss the case upon the request of a party in interest other than the debtor if the movant establishes "cause" and there are no "unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate." Bankruptcy Code § 1112(b)(1). "Unusual circumstances" barring conversion or dismissal are present if the debtor or another party in interest establishes that there is a reasonable likelihood that a plan will be confirmed within a reasonable time (or the time specified for a small business case) and the grounds for dismissal or conversion include an act or omission of the debtor for which there exists a reasonable justification and that will be cured within a reasonable period of time fixed by the court. *Id.* § 1112(b)(2).

The term "cause" is defined in Bankruptcy Code § 1112(b)(4) to include 16 enumerated acts or omissions of the debtor or consequences of those acts or omissions, including some that focus on postconfirmation events, such as revocation of an order of confirmation under section 1144, Bankruptcy Code § 1112(b)(4)(L), inability to effectuate substantial consummation of a confirmed plan, *id.* § 1112(b)(4)(M), and material default by the debtor with respect to a confirmed plan, *id.* § 1112(b)(4)(N).

If a motion to convert or dismiss the case is brought, the court must commence the hearing on the motion not later than 30 days after the motion is filed, and must decide the motion not later than 15 days after the hearing is commenced, unless the movant "expressly consents to a continuance for a specific period of time or compelling circumstances prevent the court from meeting the time limits." *Id.* § 1112(b)(3).

Courts differ on whether postconfirmation conversion is ever appropriate. Those courts concluding that conversion is not an option reason that, after confirmation, all property of the estate vests in the debtor under Bankruptcy Code § 1141(b), leaving no estate property to be administered by a Chapter 7 trustee. *See, e.g., In re* Lacy, 304 B.R. 439 (D. Colo. 2004); *In re* Canal Street Ltd. Partnership, 260 B.R. 460, 462 (Bankr. D. Minn. 2001); *In re* K & M Printing, Inc., 210 B.R. 583, 585 (Bankr. D. Ariz. 1997); *In re* T.S.P. Industries, Inc., 117 B.R. 375, 378 (Bankr. N.D. Ill. 1990). In these situations, the court is likely to dismiss the case.

Other courts have concluded that, because the Bankruptcy Code explicitly contemplates postconfirmation conversion, it must intend that the property of the debtor that formerly composed the Chapter 11 bankruptcy estate revest in the Chapter 7 trustee upon conversion. *See, e.g., In re* Consolidated Pioneer Mortgage Entities, 264 F.3d 803, 807 (9th Cir. 2001); *In re* Smith, 201 B.R. 267, 273 (D. Nev. 1996), *aff'd*, 141 F.3d 1179 (9th Cir 1998); *In re* Hughes, 279 B.R. 826, 830 (Bankr. S.D. Ill.

2002); *In re* Calania Corp., 188 B.R. 41, 43 (Bankr. M.D. Fla. 1995); *In re* Midway, Inc., 166 B.R. 585, 590 (Bankr. D.N.J. 1994).

Successive Filings. When a reorganized debtor finds itself unable to meet the requirements of a confirmed Chapter 11 plan, it may attempt to file another Chapter 11 case to modify its obligations instead of filing a motion to convert the case to Chapter 7. The Bankruptcy Code does not bar a debtor who has confirmed a plan of reorganization from filing a second Chapter 11 case in good faith. *See, e.g., In re* Elmwood Development Co., 964 F.2d 508 (5th Cir. 1992); *In re* Jartran, Inc., 886 F.2d 859 (7th Cir. 1989). However, because section 1127(b) precludes modification of a confirmed plan of reorganization after substantial consummation of the plan, some courts have found a serial Chapter 11 filing for the purpose of modifying the prior Chapter 11 plan to be made in bad faith and dismissed the successive filing under section 1112(b). *See, e.g., In re* Elmwood Development Co., 964 F.2d 508 (5th Cir. 1992). In evaluating whether the second petition is being filed in good faith as required by section 1112(b) or rather represents an improper collateral attack on the prior confirmation order, the court must consider the circumstances surrounding both petitions, including, for example:

1) The length of time between the two cases;
2) The foreseeability and substantiality of events which ultimately caused the subsequent filing;
3) Whether the new plan contemplates liquidation or reorganization;
4) The degree to which creditors consent to the filing of the subsequent reorganization;
5) The extent to which an objecting creditor's rights were modified in the initial reorganization and its treatment in the subsequent case.

In re Bouy, Hall & Howard & Associates, 208 B.R. 737, 744 (Bankr. S.D. Ga. 1995).

Entry of Final Decree. As mentioned above, under Bankruptcy Code § 350(a) the bankruptcy judge is directed to close a bankruptcy case "[a]fter an estate is fully administered and the court has discharged the trustee." A motion to enter the final decree may be brought by a party in interest, or the court may act on its own motion. Bankruptcy Rule 3022. The Advisory Committee Notes to Bankruptcy Rule 3022 suggest that, although Bankruptcy Code § 1143 requires that "presentment or surrender of a security or the performance of any other act as a condition to participation in distribution under the plan" occur not later than five years after confirmation, "this provision should not delay entry of the final decree."

The Advisory Committee Notes to the 1991 Amendments to Rule 3022 further state that "[e]ntry of a final decree . . . should not be delayed solely because the payments required by the plan have not been completed" and suggest that the court should consider the following factors in determining whether the estate has been fully administered:

(1) whether the order confirming the plan has become final,
(2) whether deposits required by the plan have been distributed,
(3) whether the property proposed by the plan to be transferred has been transferred,
(4) whether the debtor or the successor of the debtor under the plan has assumed the business or the management of the property dealt with by the plan,
(5) whether payments under the plan have commenced, and
(6) whether all motions, contested matters, and adversary proceedings have been finally resolved.

See, e.g., In re IDC Services, Inc., 1998 WL 547085 (S.D.N.Y. 1998); Walnut Associates v. Saidel, 164 B.R. 487, 493 (E.D. Pa. 1994); *In re* JMP-Newcor International, Inc., 225 B.R. 462, 465 (Bankr. N.D. Ill. 1998).

A mega-case may involve a number of affiliated filings, and some of the cases of affiliated debtors, perhaps those with smaller and less complicated financial structures, may be completed before others. In such circumstances, the judge may wish to enter a final decree with respect to the cases of those smaller debtors even before the cases of other debtors with larger estates and more complicated issues are resolved.

Because the court has the power to reopen the case under Bankruptcy Code § 350(b), the case need not remain open merely because the court has retained jurisdiction over certain matters under the plan or the court may be asked to assume jurisdiction over disputes in the future. However, "[i]f the plan or confirmation order provides that the case shall remain open until a certain date or event because of the likelihood that the court's jurisdiction may be required for specific purposes prior thereto, the case should remain open until that date or event." Advisory Committee Notes to 1991 Amendments to Bankruptcy Rule 3022. *See, e.g., In re* Ground Systems, Inc., 213 B.R. 1016 (9th Cir. BAP 1997).